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Current Topics.

ARKANSAS PRACTICE.—During the three weeks' session of the Circuit Court of the United States for the Eastern District of Missouri, which has just been held by Hon. Henry C. Caldwell, judge of the United States District Court for the Eastern District of Arkansas, a large amount of business has been transacted. It is not too much to say that the learned judge made himself a great favorite with the St. Louis bar. He came here very unwillingly, and announced that fact to the bar on the first day on which he held court. He also told the bar that, during the few days he should be able to remain, he would not undertake to learn the Missouri practice, but would get through the business before him according to the Arkansas practice, in the best way he could. The Arkansas practice which the learned judge introduced is certainly a very practical and satisfactory system of practice. It places the judge on terms of reasonable familiarity with the bar, and at once abolishes that dreaded distinction of *up here* and *down there*. At the same time it permits no pettifogging or undue familiarity. Every respectable member of the bar is addressed as "brother," and is thus put upon his good behavior. He is thus, in effect, reminded that judges and lawyers alike belong to a great profession, whose highest honor is to tell the truth, and whose highest interest is the upright administration of justice. To our mind there is something eminently fitting in a judge addressing the bar in this way. Military commanders know that by addressing the subordinate officers and mass of common soldiers that compose an army, as "comrades," faith and devotion are increased, while discipline is not diminished. Shakspere understood this when he made Henry V say to his soldiers:

> "For he, to-day, that sheds his blood with me,
> Shall be my brother."

But what is most to be admired in Judge Caldwell's "Arkansas practice," is the ready tact with which idle verbiage and wrangling are cut off, business despatched and substantial results reached, without prejudicing the rights of parties, or even offending the verbose members of the profession. The secret seems to consist in the possession of a rare temper, and in the importation of an unusual share of practical common sense into judicial proceedings. We are sure that if our own able and excellent district judge shall be again obliged to call for help from another circuit, the unanimous wish of our bar will be that Judge Caldwell may visit us again, and bring his "Arkansas practice" along with him.

DEFECT IN THE LAW—MECHANICS' LIEN.—A recent case decided in the Court of Common Pleas for New York, Preusser v. Florence, is of interest on account of the similarity of the New York City lien law to those of other states. In Missouri the law is substantially the same as in that state. Wagner's Statutes, Lien Law §§ 5, 16. The effect of the decision is, that the owner and contractor can avoid and defeat the lien of the sub-contractor by extending the time of payment of the contractor beyond the period exceeding ninety days from the filing of the lien, or for some unimportant lack of completing the work of the contract. This would work so manifest an injustice, that if the decision is maintained, an amendment to the law would seem to be necessary to protect the rights of the sub-contractor. The case was an action brought by a sub-contractor against the debtor in which it appeared that there was nothing due the principal contractor on account of the work being incomplete. In passing upon it, Van Brunt, J., says: "It is true that the referee, before whom this cause was tried has reported that the work was substantially completed at the time of the commencement of this action, but how he has arrived at any such conclusion, it is somewhat difficult to imagine, because the undisputed evidence is that the dumb waiter called for by Hart's contract was not put in until about the month of May, nearly two months after this action was commenced. It also appears that during the whole of the month of March, and a part of April, Hart was engaged in finishing up the job by building the stairs, and finishing and trimming the building. This evidence shows clearly that at the time of the commencement of this action the last payment, which was the only one upon which the plaintiff's lien could attach, was not due. Upon this state of facts Hart could not have maintained any action to recover this payment, and it is difficult to see how the plaintiff can maintain the action, which rests solely upon Hart's right to recover as against Florence. The case of Smith v. Brady, 17 N. Y. 173, has established the doctrine that before a contractor can maintain an action for money to grow due upon the completion of a contract, he must show that he has complied with the terms of his contract, and if he is not able to do this, no recovery can be had. The principle established by that case has never been overruled, and, applied to the facts of the case at bar, shows that no action could have been maintained by Hart, the contractor, against Florence, the owner, at the time of the commencement of this action because the work was not at the time completed."

ENJOINING RECEIVERS OF OTHER COURTS.—The familiar and necessary principle of jurisprudence, that when one court through its receivers has possession of certain property, no other court will interfere with that possession, and that the officers of one court are not amenable to the process of any co-ordinate court, was brought to mind on Wednesday last in the Circuit Court of the United States at St. Louis, Caldwell, J., being on the bench. The receivers appointed by this court to take possession of and manage the Pacific Railroad had, in pursuance of their duty, as they thought, ordered the sinking of the track on Austin street in this city, in order to enable them to run cars to a certain elevator. The use of the street had been granted the Pacific Railroad Company, by the city, many years ago, but it appears that the sinking of the track would materially damage the abutting property. Mrs. H., a widow lady, owning property fronting on the street, brought an action in the state court to enjoin the receivers from the prosecution of this work. Both the railroad company and the receivers were made defendants. The action was not in form prosecuted against the receivers as individuals, but named them as receivers appointed by the United States Circuit Court, and in custody of the railroad. The case was heard before Wickham, J., who awarded a temporary injunction, taking the ground that the receivers, in prosecuting the particular work, were not acting within the scope of their authority as receivers, but were mere trespassers.

These being the facts briefly stated, Messrs. Bowman and Portis, for the receivers, moved in the United States Circuit Court that an order be granted restraining the plaintiff from the further prosecution of the suit in the state court. Mr. Farish opposed the motion, and cited several authorities to

show that where receivers act outside the manifest scope of their employment, they are amenable to any tribunal having jurisdiction over their persons, whether the one by which they were appointed receivers or not.

Caldwell, J., said that this principle was undoubtedly true. For instance, if one of these receivers had gone out upon the street and impressed the horses and wagon of a citizen, the latter could maintain replevin for them in any court having jurisdiction; but that principle does not apply here. Here the receivers are acting with reference to the property given them in charge. To say that they are using this property so as to commit a trespass upon a citizen, and that therefore they are amenable to a tribunal other than this court, is a begging of the whole question. One court having custody of property through its receivers can not admit that another court has power to define what are their duties with reference to such property. To admit such a principle would be to permit other tribunals to instruct our receivers in regard to their duties, and to surrender control over them to the numerous courts within whose jurisdiction they are obliged to act. The learned judge said he would issue the restraining order prayed for in this case, unless the plaintiff would enter into a stipulation to dismiss the suit in the state court, and submit to an assessment of damages in the mode pointed out by law; and this was accordingly done.

ACTION ON CONTRACT FOR SECRET SERVICES—PUBLIC POLICY.—The United States Supreme Court at its last term, in the case of Totten, administrator v. The United States, held that an action can not be maintained against the government in the court of claims, upon a contract for secret services during the war, made between the President and the claimant. The particular case which brought forth this decision was an action to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary states, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid two hundred dollars a month. The court of claims found that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President, and that upon the close of the war he was only reimbursed his expenses. But the court, being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, decided, for the purposes of an appeal, against the claim and dismissed the petition.

The supreme court found no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy, and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. The objection of the court was not therefore to the contract, but to the action upon it in the court of claims, and on this ground the decision of the court below was sustained and the suit dismissed. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If, upon contracts of such a nature, an action against the government could be maintained in the court of claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible, and as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind and thus defeat a recovery. It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle suits can not be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Husband and Wife—Action by Divorced Wife for Acts done during Marriage.

In Phillips v. Barnett, 45 L. J. Q. B. (N. S.) 277, the English Court of Queen's Bench, *per* Blackburn, Lush and Field, JJ. has recently held, that an action by a divorced wife against her former husband, for acts done during the coverture, will not lie. The declaration was for an assault, to which the defendant pleaded that, at the time of the committing of the grievances alleged, the plaintiff was his wife. To this the plaintiff replied that before suit the marriage had been dissolved by an absolute decree of the divorce court. The defendant thereupon demurred. In support of the demurrer it was maintianed that no action could be brought for acts done during marriage. The cause of action is not suspended, for it does not exist at all. The law regards husband and wife as one person during coverture. 1 Bl. Com. 422, Comyn's Digest, Baron and Ferne. Field, J., suggested that this was not always true. Slandering a husband to his wife is a publication of the slander. Wenman v. Ash, 13 Com. B. Rep. 836; Haselinton v. Gill, 3 Term Rep. 620. Counsel for the defendant further contended that such an action is opposed to the whole policy of the law, and no such action has ever been brought. Blackburn, J., remarked that till divorces existed, no action could be brought, but it might be *cessante ratione cessat lex*. Coverture was only a plea in abatement, not in bar. Guyard v. Sutton, 3 C. B. 153. The action of the wife, counsel argued, was in fact the husband's action. He might take the damages recovered, and even equity would not inter-

fere. Nor is a divorce retrospective. Midland Railway v. Pye, 10 C. B. N. S. 179. On a decree in the divorce court, the judge is empowered to order that the husband shall, to the satisfaction of the court, secure to the wife such gross or annual sum of money, as, having regard to her fortune, the ability of the husband and the conduct of the parties, shall seem reasonable. The expression "conduct of the parties," would seem expressly intended to include such conduct as is complained of in this case. So if the plaintiff were allowed to recover, she would get her damages twice over. On the other hand, it was argued by counsel for plaintiff, that if a man assults a woman, it is clearly a wrong. If there is a wrong, there must be a remedy. Ashby v. White, 1 Smith L. C. 251. If the parties are husband and wife, the remedy is no doubt suspended, but on dissolution of the marriage it revives. A husband may be made to pay the costs incurred by his wife in employing an attorney to exhibit articles of the peace against him. Turner v. Roakes, 10 Ad. & E. 47. That shows that even during the coverture there is some remedy, though it is not by action. In Wells v. Malbon, 31 Beav. 48, a divorced wife was held entitled to a sum of money which she claimed under a will, though the testator died during the coverture. Romilly, M. R., decided that her rights were the same as if, at the date of the divorce, the husband had died. In Capel v. Powell, 17 C. B. N. S. 743, it is laid down that after a divorce *a vinculo matrimonii*, a wife is in the same position as if she had never been married. A wife has clearly a right to her personal safety. Lord Audley's Case, 1 State Trials, 168. Husband and wife are clearly different persons in equity, and the matter here, though not in form equitable, may be so in substance. Even in law they are different for many purposes. As Maule, J., says in Wenman v. Ash, *ante*, "If a man kills his wife, he commits murder and not suicide." The unity of person is really only a figure of speech. If this action will not lie, the plaintiff is without remedy.

The court unanimously sustained the demurrer on the following grounds: It is clear that this action is not maintainable. If a wife receives bodily injuries at the hands of her husband, the husband does not escape with impunity. He may be punished criminally for a felony or a misdemeanor, as the case may be. There is no question that an assault by a husband on a wife is a grievious wrong not to the wife only, but to society, and as such it may be punished criminally. Again, she may protect herself by exhibiting articles of the peace against him, and, as was pressed upon the court in argument, she is, in this and other respects, treated in law as a separate person. But whether even after a divorce a wife can sue her husband, or a husband sue his wife—for the question is of course the same in both cases—for acts done during the coverture, is a very different question. That depends on what is the true reason why she or he would be prevented from suing the other while the coverture continued to exist. At first the court was inclined to think that the true reason why it could not be done was the technical one arising out of the necessity of joining the husband with the wife, whether as plaintiff or defendant. No doubt this difficulty would of itself prevent such actions being brought during the coverture, but if this were the only obstacle, it might cease to exist when the marriage was dissolved by divorce. But the rule as to joinder of the husband and wife is itself a consequence of a principle which is deeper. That principle is that the husband and wife are regarded in law as one person. The rule is so laid down in Coke and Blackstone. The former says: "A *feme covert* can not take anything of the gift of her husband." Co. Litt. 3 *a*, and in a note it is added "adjudged accordingly in Chancery, 2 Vern. 385, and 3 Atk. 72. But the doctrine must be understood with various limitations. Though the husband can not convey to the wife immediately, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seized, or surrendering a copyhold estate to her use. So he may convey to that wife's use under a power," and no doubt chancery for many purposes recognizes the independent existence of the wife. The authorities all show that they can not covenant with each other or grant to each other, and this disability certainly is not founded on any technical objection as to the necessity of joining them in an action. Clearly this technical objection grows out of the unity of person which underlies the whole relation. Again, if the technical objection were the only one, as soon as that were dissolved by the death of either husband or wife, the survivor might sue the executors of the deceased for acts done during the coverture, which in fact can not be done. The reason, therefore, why a husband can not sue a wife, or a wife sue her husband for beating or injuring him or her must be because, owing to the unity of person, no cause of action ever exists at all. The same thing applies in criminal matters where a wife who in fact steals her husband's goods, doing acts which in a mistress would be clear larceny, is yet not liable to be convicted. It must be taken then, that they are at least so far one person, during the marriage, that one can not sue, or so much as give to the other.

What, then, is the effect of a dissolution of the marriage by divorce. How the fact of dissolution can make that into a cause of action which was not so before, is difficult to see. No doubt the mere fact that no such action had ever been brought was easily accounted for. Except in cases of divorce, it was an impossibility to bring it. If one party was dead, then the action failed on the principle *actio personalis moritur cum persona;* while so long as both lived, the necessity of joining the husband with the wife, whether as plaintiff or defendant, was fatal. But this, as has been said, through sufficient, was not the true reason. The true reason lies in the person. A divorce does not annul the marriage, or make it void *ab initio;* it simply terminates the relation from the time of the divorce.

Conditional Sale of Chattel.

BARROWS *ET AL.* v. ANDERSON.

In the Circuit Court of Atchison County, Missouri.

Before Hon. H. S. KELLY, Circuit Judge.

Where a chattel is sold and delivered on condition that the ownership and title shall remain in the vendor until final payment, it is at the risk of the purchaser, and if destroyed, although by fortuitous accident, the loss must fall upon him.

KELLY, J.—Suit upon the following note:

$85. June 25th, 1873.

Two years after date I promise to pay to the order of Thomas Barrows & Company of Chicago, Illinois, eighty-five dollars, with interest after one year, at ten per cent., payable at Rockport, Missouri, value received. This note having been given to said Thomas Barrows & Company as purchase-money for a Victor sewing machine, No. 62791, it is hereby agreed that the ownership and title to said machine shall remain in said Thomas Barrows & Company, until this note is fully paid.

(Signed) W. R. ANDERSON.

The answer of the defendant admits the execution of the note, with the condition therein contained, and alleges as a defence that before the note became due, and before any part of the note had been paid, the machine was destroyed by fire, together with his house and all his household goods, without any fault of defendant, etc., etc. Wherefore the consideration of the note has wholly failed, etc.

Mr. E. J. Kellogg for the defendant, contends that the condition in the note makes the supposed sale a lease of the machine to the defendant, (the property and ownership remaining in the seller until payment); that the property was at the risk of the seller, and the accidental destruction of it without the fault of the defendant, destroyed the consideration of the note, and there is, therefore, a failure of the consideration, which is a good defence.

It is the settled law that the sale and delivery of property on condition that the property shall not vest until the purchase-money is paid, does not pass the title to the vendee until the condition is performed, and the

vendor may retake the property upon default in the condition, even as against an innocent purchaser, if guilty of no neglect. 36 Mo. 479; 44 Mo. 412; 52 Mo. 24; 18 Ind. 377; 28 Ind. 255; 3 Gray, 545; 49 Me. 213; Sto. on Sales, § 313, *n.* 2.

But the question here is, at whose risk was the property? And who must bear the loss? The purchaser by his note obligated himself to pay the price at a given time; there is no condition or contingency expressed in the note upon which he can avoid payment, and the question is whether the law will supply such a condition.

There is no doubt but that the title and right of property, by the terms of the note, remained in the seller, while the possession and right of possession were with the defendant, and the seller could not assert any claim to it until the buyer made default. The seller held the naked title, subject to the interest of the buyer, *i. e.*, the contingent right to a title which would vest absolutely, on payment of the price, without any further act on the part of the seller. The right to the use of the machine for two years, with the contingent right to a perfect title upon the payment of the price, constituted the consideration of the note.

Suppose the machine had been worn out, or had gotten out of repair with ordinary use, or became less valuable or depreciated in price by reason of a decline in the market, through no fault of the buyer, would there have been a partial or *pro tanto* failure of the consideration of the note? If not, does the total loss of the machine by fire, without any fault of the defendant, work a total failure of the consideration? I think not. I am of opinion that, although the title was in the plaintiffs, and would not vest in the defendant until payment of the price, yet the machine was at the risk of the defendant, and its loss by fire constitutes no defence to the note sued upon, etc.

Partnership—Recission of Contract—Fraud.

MONTGOMERY, ASSIGNEE OF STEWART *ET AL.* v. BUCYRUS MACHINE WORKS.

Supreme Court of the United States, October Term, 1875.

1. Partnership.—Where a party has the option to become a member of a certain firm, in a certain transaction, on making his election he becomes a member, without any articles of partnership being signed.

2. Recission of Contract—Fraud.—Where D had always dealt with the firm of A, B and C, and had no information of the retirement of C from the firm, but relied on the representations of C that the firm was the same, until after the bankruptcy of A and B, and rescinded the contract and received the goods back, *Held*, that he was not liable to the assignee of A and B for such proceeds.

In error to the Circuit Court of the United States for the Western District of Missouri.

Mr. Justice DAVIS delivered the opinion of the court.

There can be no question, on the conceded facts of the case, that Stewart, Porter and Wallace were co-partners under the firm name of Stewart, Porter & Co., so far as the transaction and contract with the defendant are concerned, and that they are bound to it by the duties and obligations arising out of that relation. The firm of Stewart, Porter & Co. was formed at Sedalia, Missouri, in January, 1870, by Stewart and Porter, to deal in agricultural implements, with a view to include Wallace, if he chose to join it, and the name of the partnership was taken for this purpose. Wallace was sent by Stewart and Porter soon after this to Ohio, where the works of the defendant, a manufacturing corporation, were situated, to made contracts with it as their partner, if he elected to become such. This election was all that was required to render him a member of the firm; there was no necessity that he should sign any articles of co-partnership.

Wallace, when he reached Ohio, elected to join the firm. Pursuant to the express authority conferred upon him by his associates in business, he entered into a contract of purchase with the defendant, to whom he represented that the firm consisted of Stewart, Porter and himself, was solvent and doing a good business, and that Porter was wealthy. Previous to this the defendant knew nothing of the firm, but relying on the truth of his statements, parted with its property to a firm, composed of Stewart, Porter and Wallace; nor did it learn that Wallace had retired from the firm until after proceedings in bankruptcy were commenced against Stewart and Porter. It dealt throughout, as it had commenced, with a firm composed of the three persons, and, so far as it is concerned, the firm was not changed.

It is true, before it closed its dealings it acted under the belief that this firm was insolvent, but this was a mistaken belief, as the firm owed no one else, and the firm composed of Stewart and Porter, which was insolvent, was not indebted to the defendant.

By the terms of the contract made by Wallace, on behalf of the firm, with the corporation, one car-load of machines was sold and delivered at the time, and there was a further agreement to fill all orders as soon as practicable. From time to time orders were made and machines forwarded. They were generally shipped direct to the different persons who had engaged to sell them for Stewart, Porter & Co., and the proceeds of these machines, when sold, were devoted, with the consent of all parties, to discharge the debt due the corporation, and the unsold machines were returned to it.

It had the right to rescind the contract on the ground of fraud, and follow the property or its proceeds wherever they could be found. This it did not do, because its agents and officers had no reason to believe that Wallace had actually misled them to its injury until after the machines were all sent forward. But equity and good conscience required that the proceeds of property obtained from it by fraud should be paid to it, or that the property itself, if unsold, be returned. This was recognized by Stewart, Porter and Wallace, and the arrangement by which this was done is binding on them and the corporation. The machines did not lose their identity, nor can it be said that they formed a part of the permanent stock of goods of the bankrupts, Stewart and Porter, so that they can be considered as having thereby obtained credit. Their creditors, therefore, have no right to complain, as the settlement was made in the absence of actual fraud. And the mere fact that when it was made the corporation knew that Porter and Stewart were insolvent, does not render it fraudulent under the bankrupt law. The transaction by which it got part of the machines back and received the proceeds of those which had been sold, was, under the circumstances, most equitable; and it can not be defeated by the consideration that Wallace, after he had made the contract, was allowed to retire from the firm. It would be a great wrong to the corporation, who knew nothing of this, or of the untruthfulness of Wallace's representations until after the property had all been delivered. It always dealt with the firm as composed of Stewart, Porter and Wallace. Having no information to the contrary, until after the bankruptcy of Stewart and Porter, and the receipt of the proceeds of its own property fraudulently procured from it, the corporation is not liable to the assignee of Stewart and Porter for such proceeds.

Judgment affirmed.

Bankruptcy—Jurisdiction of United States Circuit Court—Preference.

LATHROP, ASSIGNEE v. DRAKE *ET AL.*

Supreme Court of the United States, October Term, 1875.

1. Jurisdiction of Circuit Court—Construction of Bankrupt Act.—Under the bankrupt act of 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, may maintain a suit for the recovery of assets in a circuit court of the United States, in any district, whether the decree of bankruptcy was therein made, or not.

2. Preference by Debtor.—A bankrupt, before proceedings had been instituted, wrote to defendants, his creditors, that he had executions against him, and requesting their aid. This they refused unless he would in their behalf confess judgment for the amount due them, including the amount of the prior judgments. The bankrupt did so, whereupon the defendants immediately levied on all his goods and sold him out. *Held*, a case of preference by a debtor in insolvent circumstances.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Justice BRADLEY delivered the opinion of the court.

The question in this case is whether, under the bankrupt act as passed in 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a Circuit Court of the United States in any district other than that in which the decree of bankruptcy was made? If not, whether the amendatory act of 1874 (18 Stat. 178, § 3) validated such a suit already commenced.

The jurisdiction of the circuit courts in cases of bankruptcy, as conferred by the act of 1867, was two-fold, original and appellate; the latter being exercised in two different modes, by petition of review and by appeal or writ of error. But the enacting clauses which confer this jurisdiction make such direct reference to the jurisdiction of the district court, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition and ending in the distribution of assets amongst the creditors and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified, resulting, however, in the two general classes before mentioned. Were it not for the words "in their respective districts" the jurisdiction would extend to matters of bankruptcy arising any where, without regard to locality. It is contended that these words confine it to cases arising in the district. But such is not the language. Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy, without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy without limitation. There are, it is true, limitations elsewhere in the act; but they affect only the matters to which they relate. Thus by section 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided or carried on business for the six months next preceding; and the district court of that district being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other district courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of, or connected with,

that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to, and in aid of, the proceedings in bankruptcy may be necessary in other districts where the principal court can not exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the states in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of Shearman v. Bingham, 7 Bankruptcy Register, 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy.

Turning now to the jurisdiction of the circuit courts, we find it enacted in section two of the act of 1867, first, that the circuit courts within and for the districts where the proceedings in bankruptcy are pending shall have a general superintendence and jurisdiction of all cases and questions arising under the act. This is the revisory jurisdiction before referred to, exercised upon petition or bill of review. Secondly, said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity * brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." The act of 1874 changes the words "the same district" to "any district," and adds to "person claiming an adverse interest" the words "or owing any debt to such bankrupt." These changes make the jurisdiction of the circuit court for the future clear and undoubted in cases like the present. But we are endeavoring to ascertain what jurisdiction was conferred by the act as originally passed. Reverting to the language used in the second clause above cited, it seems to be express and unqualified, that the circuit court shall have concurrent jurisdiction with the district courts of the same district. If, therefore, the district court has jurisdiction of suits brought by an assignee appointed in another district, the circuit court of the same district has concurrent jurisdiction therewith. There is no escape from this conclusion unless the phrase "the same district" is made to refer back to the beginning of the section, where mention is made of circuit courts within and for the districts where the proceedings in bankruptcy are pending. But the words "the same district," used in the second clause, refer more naturally to the district in and for which the circuit court is held. The phrase "the circuits courts shall have concurrent jurisdiction with the district courts of the same district" is, by itself, so clear and unambiguous that a doubt could not have been raised as to its meaning had it not been embraced in the same section with the other clause. And it is in accord with the general intent of the act to invest the circuit courts with jurisdiction co-extensive with that of the district court, except that it is only revisory in reference to the proceedings in bankruptcy.

If jurisdiction was conferred (as we have seen it was) on the various district courts, to entertain suits brought by assignees appointed in other districts, there seems to be no reason why the same jurisdiction should not have been conferred on the various circuit courts; but, on the contrary, very cogent reasons why it should have been. Important cases would be very likely to arise, both in amount and in the questions involved, which it would be desirable to bring directly before the circuit court, in order, if necessary, that an early adjudication might be had in the court of last resort.

As, therefore, the reason of such a provision, the general intent of the act, and the words themselves, all concide, we do not hesitate to say that the circuit court had jurisdiction of suits at law and in equity under the original act, co-extensive with the district courts, unless the qualifying words, at the end of the clause, confining the jurisdiction to cases "touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee," may be deemed a restriction. In this case, however, the suit does concern and have reference to property transferable to the assignee. It is brought to compel the defendants to restore to the bankrupt's estate the value of property sold by them under a judgment alleged to have been confessed in fraud of the bankrupt act, and within four months of the commencement of proceedings in bankruptcy.

The amendatory act of 1874 has but little bearing upon the construction of the original act in the particular involved in this case. Different views had been expressed in relation to its meaning and the jurisdiction of the courts under it. The amendatory act removed any ambiguity that may have existed; but did not thereby impress a more restricted meaning upon the language of the original act than was due to it by a fair judicial construction.

As to the merits of the case, it is almost too plain for argument. The general denial of fraud in the answer of the defendants is equivalent to nothing more than a denial of a conclusion of law, The allegation that they were led to believe, by the letters and representations of the bankrupt, that he was solvent at the time of the confession of judgment, and was worth seven thousand dollars over and above his indebtedness, has but little force. If this were true, why did they immediately levy on and sell his whole stock of goods? That sale produced but little more than half the amount of their judgment. These unquestioned facts are sufficiently significant, and the evidence of the bankrupt makes the case a very strong one for the complainant. He had executions against him, and wrote to the defendants that he was in trouble, and requested them to come to his aid. They refused to do anything unless he would confess judgment for the amount due them, including the amount of the prior judgments. They then immediately levied on all his goods and sold him out. It was a clear case of preference by a debtor in insolvent circumstances, and known to be such by the judgment-creditor.

The prior executions, one in favor of A. Coran & Co., for about six hundred dollars, and the other in favor of Henry Bloss, for about nine hundred dollars, were probably valid. If the appellees satisfied those executions, or advanced the money for that purpose, the amount being embraced in their judgment, their own execution was good to that extent, and they should have credit therefor. As to the rest, they were answerable for the value of the goods levied on and sold.

The decree of the circuit court must be reversed and the record remitted with directions to enter a decree in favor of the complainant below for the value of the goods of bankrupt sold on the defendants' execution, with interest from the time that the same was demanded of them by the assignee, less the amount to which they may be justly entitled for advances to satisfy the said executions of A. Coran & Co. and Henry Bloss.

Injury to Passenger through Leaving Train while in Motion—Parent and Child.

OHIO & MISSISSIPPI RAILROAD v. STRATTON.

Supreme Court of Illinois, June Term, 1875.

Hon. JOHN M. SCOTT, Chief Justice.
" PICKNEY H. WALKER,
" SIDNEY BREESE,
" B. R. SHELDON,
" W. K. MCALLISTER,
" JOHN SCHOLFIELD,
" ALFRED M. CRAIG,
} Judges.

1. Case in Judgment.—Plaintiff, at the time the injury complained of was received, was an infant. His father, in whose care he was, purchased tickets for himself and son on the night train from St. Louis to Salem, a station at which this train did not usually stop. He was assured, however, by an officer of the road, that on this night it would stop at Salem. Father and son took the train on this assurance. As it was being checked up on nearing that station, passengers began to get ready to leave the car, when the superintendent called out in a loud voice, "Don't get off till the cars stop." This, the plaintiff and his father did not hear, as they were on the platform. Before the cars had stopped, they jumped off, and plaintiff was injured. *Held*, that the father was guilty of negligence, and plaintiff could not recover.

2. ——. A passenger has no right to attempt to get off a train when in motion, and if he undertakes to do so, without the knowledge or direction of any employee of the company, it is at his peril.

3. Negligence of Parent.—The negligence of the parent or guardian, having in charge a child of tender years, does not excuse the carrier from using all the means in his power to prevent an injury. But if the negligence of the former were the proximate cause of the injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier will not be responsible.

4. Burden of Proof.—It is the duty of the carrier to show that it was by no omission of duty on its part that the accident occurred, and that timely discharge of all duties imposed by law, and prudent care for the safety of passengers, would not have averted the damage.

Appeal from Marion Circuit Court.

H. P. Buxton, for appellant; *B. B. Smith* and *Crews & Haynes*, for appellee.

Mr. Chief Justice SCOTT delivered the opinion of the court.

When plaintiff was injured he was but ten years old. That was in 1873. He had just arrived from St. Louis. His father, in whose care he was while in the city, desired to leave for Salem by the evening express train, on defendant's road. That train it was known did not usually stop at Salem, but on enquiry of the division superintendent, it was ascertained it would stop that night; accordingly he procured passage for himself and son. On his arrival at Salem, in attempting to leave the cars, plaintiff was in some way thrown, or fell, under the moving cars, and had both legs so badly crushed they had to be amputated. Soon after reaching his majority, plaintiff commenced this action to recover damages for the injuries sustained.

In the first count of the declaration, it is averred, as a ground of liability, that plaintiff, being a passenger from East St. Louis to Salem, defendant did not at the latter station slacken the speed of its train, and stop a reasonable length of time, to enable plaintiff to get off the cars without injury to his person; that defendant did not use due care in that regard, but on arrival at Salem slackened the speed of the train, thereby inviting plaintiff to leave the cars, and that with the consent and persuasion of defendant, plaintiff did alight from the cars, but by means of the rapid rate at which the train was moving, he was thrown violently upon the platform and thence underneath the moving cars. And in the second count it is averred defendant did not at Salem stop its train a reasonable length of time to allow plaintiff to leave it with safety, but negligently and carelessly, suddenly started the train in mo-

tion, whereby plaintiff was violently thrown underneath the moving cars, and was injured.

It is not claimed any recovery can be had on the first count. The proof shows, and it is not now disputed, the train was stopped a reasonable time to permit all persons to get off with entire safety. A number of passengers, among them women and children, did get off at that station, ample opportunity being allowed for that purpose. There can be no pretence; that branch of the case has been sustained by any testimony offered. The contest is as to the cause of action attempted to be set up in the second count, viz., whether defendant, although it may have stopped its train, suddenly started it up again, with such violence, while plaintiff was in the act of getting off, as to throw him upon the platform and from thence under the cars.

The jury found the issues for plaintiff, and the principal question is whether the verdict can be maintained by the testimony.

It will not be necessary to remark on all the instructions given on behalf of plaintiff, further than to say, many of them are faulty in the statements of legal principles applicable to the case. The case is by far too serious in its character and too sad in its consequences, to be decided on any mere technical objections to instructions. We prefer to place our decision on the merits of the case alone. The injury plaintiff has sustained is irreparable, and if a recovery can be had at all, the present judgment ought to be affirmed. No measure of damages can make full reparation. These considerations have induced a most careful and painstaking investigation of the case in all its phases. We have examined the record with that degree of care the importance of the case demands, and however much we may be touched by the inexpressibly sad misfortune of plaintiff, we have been unable to discover, even under the most favorable view of the evidence, any tenable ground upon which to place an affirmance of the judgment in his favor.

Plaintiff was too young to exercise any great degree of care for his personal safety. He was largely controlled in his actions by his father, in whose care he had been travelling. The arrangment for leaving Saint Louis on the evening express train that did not usually stop at Salem, was made by his father. Plaintiff had nothing to do with the selection of the train he was to go on. An accommodation was to leave on the same evening, but at a later hour, which it was known would stop at all the stations for the convenience of passengers. But his father chose the express train, and plaintiff had no choice in the matter.

Conceding it to be a correct principle, the negligence of the parent or other guardian having in charge a child of tender years would not excuse the carrier from using all the means within its power to prevent the injury, still if the negligence of the former was the proximate cause of injury; to the child by unnecessarily and imprudently exposing it to danger, the carrier upon no just principle can be held responsible. It is not the negligence of defendant, but of the party having the control of the child, and if any liability attaches to either party, it must be to the latter. Nevertheless it is the duty of defendant to make it appear it was by no omission of duty on its part the accident occurred, and that the timely discharge of all duties imposed by law, and the prudent care for the safety of passengers, would not have averted the danger. This brings us to consider whether defendant in the case at bar has been guilty of any negligence that tended to produce the injury to plaintiff, even under the strictest rule of liability the law imposes.

There is but little conflict in the evidence as to the principal facts; not more than often occurs in the account given by different persons of any casualty witnessed by them. Both parties agree plaintiff's father was assured by Mr. Hinckley, the division superintendent, the express train would stop at Salem that night, and that this assurance was given before he engaged passage for himself and son. At Odin a number of passengers were taken on for Salem, under a like assurance from the superintendent the train would stop at that station. This latter fact must have been known to plaintiff's father, as the superintendent was in the same coach with him, and it seems hardly possible he did not hear the enquiries on that subject. It was about dark, or possibly a little after, when the train reached Salem. As the train was being checked up, passengers for that station began to prepare to leave the cars, when Hinckley, in a voice loud enough to be heard, and which was heard by many, said to them, "Don't get off till the cars stop." Plaintiff and his father both deny they heard this announcement.

In his testimony plaintiff's father gives this account of the accident that befell his son. When the whistle sounded for Salem station, he and his son went out upon the platform of the car. As the train approached the station, they went down on the steps of the car, to be ready to step off as soon as the train would stop. Plaintiff was on the lower step and witness on the one next above, holding plaintiff by the hand both of them carrying some baggage. Witness remembered saying to his son not to get off till the train stopped. When the car came to the platform of the station, plaintiff stepped, and the witness adds as to the cause of accident, the train seemed to stop just as his son stepped off, and then suddenly started forward again by a violent movement, which threw him upon the platform, and his son under the wheels of the cars. Substantially the same account of the immediate cause of the accident is given by plaintiff. No doubt they believed and do yet believe the train had come to a halt when plaintiff stepped from the cars, but in this they must have misjudged, being misled in all probability by the darkness of the hour. The violence of the accident corroborates this theory of the case. This result could not have been produced unless the train had been in rapid motion. Manifestly they were mistaken as to its speed, or else they would never have taken the false step. Other passengers who got off at that station all unite in saying the train stopped in the usual way, and they noticed no unusual motion. No one of all the witnesses sworn, except plaintiff and his father, observed the facts testified to by them, that the train was first stopped and then suddenly started with great violence. The witness Andrews says that he and his mother, then fifty-eight years old, were standing up in the car waiting for the train to stop, but experienced no sudden jerk or shock. A woman with an infant in her arms, was also standing up in the car, but observed no unusual or violent motion. All other passengers for Salem got off when the train stopped without difficulty, plenty of time being given for that purpose. No reason is shown in all this evidence why plaintiff and his father could not have done the same thing, had they observed due care for their personal safety.

By their voluntary choice they selected a most dangerous place on the steps of the car, while the train was yet in motion. Both were encumbered with baggage which would effectually prevent them from holding on to anything to secure their safety. The position occupied was dangerous, and was taken without due care. Whether the accident was produced by any sudden violent movement of the cars, caused by putting on, or letting off, brakes in the ordinary management of the train, or whether they were induced to step off under the belief the train had come to a halt, when it had not, it must be attributed to their own omission to observe the usual precautions, rather than to any negligence on the part of defendant. It may have been the impression of plaintiff's father the train would stop at that station but a short time, and that it would be necessary to get off very quick. But the belief, however induced, could not justify him in exposing himself and son to such great hazards. He had been assured by officers in charge of the train it would stop to let off passengers, and he ought to have relied on that assurance. Had he remained in his seat, he could have heard the announcement, which was distinctly heard, by others, "Don't get off till the cars stop," which would have put him on his guard.

Defendant had undertaken to stop its train at Salem to let passengers get off, and any violation of that agreement would have subjected it to damages. A passenger has no right to attempt to get off a train when in motion, and if he undertakes to do so without the knowledge or direction of any employee of the company, it is at his peril, and he must bear the consequences, however disastrous. Ill. Cent. R. R. Co. v. Slatton, 54 Ill. 133; Chic. & Alton R. R. Co. v. Randolph, 53 Ill. 510.

The verdict in our opinion is against both the law and the evidence, and the judgment must be reversed.

Common Carrier—Negligence—Public Enemy.

CALDWELL v. SOUTHERN EXPRESS CO.*

United States Circuit Court, Western District of Tennessee.

Before Hon. H. B. Brown, Eastern District of Michigan.

1. **Carrier—Negligence—Public Enemy.**—Where by negligence of a common carrier in exposing property intrusted to it to capture by a public enemy the property is captured and destroyed, the carrier is liable.

2. ——. **Measure of Damages.**—Plaintiff, then living within Confederate territory, delivered to defendant at Jackson, Tennessee, to be carried to New Orleans, a package of Confederate money and Southern bank notes. Before the package reached New Orleans in the usual course of business, the city was taken, and after waiting a reasonable time, the package was returned to Jackson for redelivery to the plaintiff; but before this could be effected, the town was taken and the property destroyed by federal troops. *Held*, that the measure of damages was the value of the package after the close of the war, when demand for the same was made, with interest from that date.

This was an action of assumpsit to recover of defendant the value of a package of confederate money and Tennessee bank notes delivered to it in April, 1862, at Jackson, Tennessee, consigned to parties in New Orleans, Louisiana. At the time of the delivery, plaintiff was a resident of Henry county, Tennessee, then under confederate dominion and control. Plaintiff sent the package by an agent to Jackson, where it was delivered to the express company on the 23d of April, but before it reached New Orleans the city was captured by the federal forces, and after a delay of about six weeks, in the hope it might be delivered to the consignee, it was returned to Jackson, where it was soon afterwards captured in the occupation of the town by the federal troops. Before it was returned to Jackson, the army had advanced so far southward that communication with plaintiff's residence was impossible, Henry county being then wholly occupied by the invading army. Some evidence was offered tending to show negligence on the part of defendant in its care of the package after its return to Jackson, and in failing to withdraw it on the advance of the federal troops, and the court charged the jury among other things:

1. That the defendant was bound to take the same care of plaintiff's package that it did of its own property, and if its loss was occasioned as well by the neglect of the defendants in this regard as by the act of the Union forces, the defendant was liable.

2. That the measure of damages was the value of the package at the time of its loss, with interest thereon from that date.

Defendant offered evidence tending to show that although confederate money and Tennessee bank notes were worth seventy-five cents on the dollar at that time, they became worthless at the close of the war.

A motion for a new trial is now made, for error in the above charges.

L. D. McKisick, for plaintiff; *Robert Hutchinson*, for defendant.

Brown, J.—I see no error in the first charge. The rule is well settled

*For the report of this case we are indebted to Hon. J. O. Pierce, of the Memphis bar.

that when a loss is attributable to the concurrent negligence of a carrier and an act of God, the defendant is liable. To exonerate the carrier, the loss must be due alone to the act of God or the public enemy, and the ingredient of negligence invalidates the defence of overwhelming force.

The doctrine is illustrated in the case of Davis v. Garrett, 6 Bing, 716. Lime was shipped on defendant's barge to be carried from Medway to London; the master deviated unnecessarily from the usual course, and *during the deviation* a tempest wet the lime, which took fire and was destroyed. *Held*, that as the loss actually happened *while the wrongful act was in operation and force*, the defendant could not set up, as an answer to the action, a bare possibility of a loss if his wrongful act had never been done.

In the case of Williams v. Grant, 1 Conn. 487, salt was delivered at Providence, for carriage to New York. On the way down Providence river the vessel struck a rock and bilged. Evidence being introduced to show that the vessel *when she struck* was out of her usual course, that the master was unacquainted with the river and employed no pilot, though it was usual to do so, the court held these facts should have been submitted to the jury. If the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excusable. See also Merrit v. Earl, 29 New York, 115.

So in the case of Crosby v. Fitch, 12 Conn. 410. A carrier on a trip from New York to Norwich deviated by going outside of Long Island and *during the deviation* 52 bales of cotton were thrown overboard in a storm. The defence was that the sound was closed with ice, and that there was a custom in such cases to take the outside route. The court left the proof of custom with the jury, and instructed that the defendant was guilty of negligence and liable, unless the custom was shown to their satisfaction. See also Hand v. Bryner, 4 Wheat. 204; Wilcox v. Parmelee, 3 Sanford, 610; Merrick v. Webster, 3 Mich. 268; Powers v. Davenport, 7 Blatch. 497; Michaels v. New York Central, 30 New York, 564; Campbell v. Meese, 1 Harp. 468; Parker v. James, 4 Campbell, 112.

The rule is different where the negligence of the carrier has ceased to be operative before the loss occurs. In such case the carrier is not chargeable with the loss. I had occasion to examine the authorities upon this point, in the arguments of Daniels v. Ballentine, 23 Ohio State, cited by defendant, and to distinguish that case from those above cited in the fact that in Daniels v. Ballentine the loss occurred *after the negligence had ceased to be operative*. See also Ingledew v. Railroad Company, 7 Gray, 86; Denny v. New York Central Railroad Company, 13 Gray, 481; Morrison v. Davis, 20 Pa. St. 481; Reeves v. Railroad Co. 10 Wall. 176; Needham v. R. R. Co. 37 Cal. 499. It seems to me in this case, that although the defendant had ceased to become responsible as carrier for the package in question, it must be held to the liability of a bailee, that it was bound to take reasonable care that it did not fall into the hands of the enemy, and when the Union army had advanced so far southward that the capture of Jackson had become imminent, that it was its duty to remove this package, as it did its other property, and in default of so doing the jury were authorized to find the loss was occasioned by its negligence.

The request embodied in the second charge was handed to the court, as the cause was about being submitted to the jury, and no opportunity was given of an examination of the important question involved. The charge was made in much doubt of the law, feeling that an error in plaintiff's favor could be more easily satisfied than if made in favor of the defendant. My impressions at that time have been strongly confirmed by a careful examination of the authorities. I have arrived at a conclusion, not from an examination of the technical question whether in this form of action a demand was necessary before the commencement of suit, but upon the ground that plaintiff's loss was occasioned, not by the default of the defendant, but by the war then existing, and by the operation of the non-intercourse act. By section 5, of the act of July 13, 1861, it is provided that "Whenever the President * * * shall have called forth the militia to suppress combinations against the laws of the United States, * * * and the insurgents shall have failed to disperse * * * it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such state, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition or hostilities shall continue, and all goods and chattels, wares and merchandise coming from said state or section into the other parts of the United States * * * shall, together with vessel or vehicle conveying the same, * * * be forfeited to the United States."

Pursuant to this section, on the 16th of August, 1861, the President issued a proclamation declaring that the inhabitants of the state of Tennessee "are in a state of insurrection against the United States," declaring all commercial intercourse between them and citizens of the other states unlawful, and that all goods and chattels, wares and merchandise coming from any of said states into other parts of the United States will be forfeited.

This act and proclamation merely reiterated and applied to the civil war then existing the laws and usages of war between independant states, recognized by all civilized nations, and ennuncated in England in the case of the Hoop, 1 Charles Robinson, 196, and recognized in this country before the rebellion by a long and uniform list of authorities. See The Rapid, 1 Gall. 295, S. C.; 8 Cranch, 155; The Diana, 2 Gall. 98; The Coosa, Newb. 393; The Lord Wellington, 2 Gall. 103; The Joseph, 1 Gall. 545; 8 Cranch. 451; Baker v. Montgomery, 18 How. 110. The application of these doctrines to the late civil war, the right to institute a blockade and to treat the citizens of the insurgent states as public enemies even before the non-intercourse act, was recognized in the Prize Cases, 2 Black. 635.

Instances of the application of this doctrine are numerous, though a distinction is taken between contracts made during the war which are absolutely *void*, and those made before the war, which are only *suspended* during the continuance of hostilities. Jackson Insurance Company v. Stewart, 15 Am. Law Reg. (v. 6 N. S.) 732. The carriage of passengers to an enemy's port is illegal. The Rose in Bloom, 1 Dod. 57. Trading under an enemy's license is illegal. The Julia, 1 Gall. 595; 8 Cranch, 181; The Alexander, 8 Cranch, 159. So, also, is the withdrawal of goods purchased before the war. Amery v. McGregor, 15 Johnson, 24. In 1 Parsons on Shipping, 329, it is said that "if a war be declared by the country to which a ship belongs, against one to which it was about to carry a cargo, this war makes all commercial intercourse illegal, and thereby annuls all obligation of carrying that cargo, or if the proper authority of the same country lays an embargo, or passes an act of non-intercourse, or of special prohibition which extends to that ship and cargo, here the contract becomes illegal.

Citing a large number of authorities: But war annuls such a contract, while an embargo or prohibition may only suspend it.

In the case of the Jackson Insurance Company v. Stewart, 15 Am. Law Reg. (v. 6 N. S.) 732, it was held that the statutes of limitation were suspended during the rebellion, as to matters in controversy between citizens of the opposing belligerants; also that on a recovery after the close of the war for a debt due before its commencement, no interest should be allowed for the period covered by the war. The rule that statutes of limitation are suspended is also supported by Wall v. Robinson, 2 Nott. and McCord, 498; Moses v. Jones, Id. 259; Nicks v. Martindale, Harper, 138; Ogden v. Blackledge, 2 Cranch, 276.

The rule that interest is not allowed pending the war has been modified by the supreme court in cases where the creditor had an agent within the hostile territory during the war, with power to collect and receive moneys.

In the case of Mrs. Alexander's Cotton, 2 Wall. 404, it was held by the supreme court that all the people of any district that was in insurrection against the United States, in the southern rebellion, were to be regarded as enemies, and that the court could not enquire into the personal character or loyalty of individual inhabitants of enemies' territory. It was observed: "We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people in each city or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed."

The leading authorities upon the subject of commercial intercourse are reviewed in the case of Griswold v. Waddington, 6 Johns. 438, and in the more recent case of Kershaw v. Kelsey, 100 Mass. 561. See also, as to suspension by embargo, Ford v. Cotesworth, 3 Maritime Law Cases, 190, 468.

In actions against carriers the measure of damages is the value of the goods, at the place of delivery, *at the time they should have been delivered*. Angell on Carriers, sec. 482, note 2, and cases there cited.

Now, in this case, the original contract to carry to New Orleans was terminated, or at least suspended, during the war by the capture of the city. It then became the duty of the company to return the property to the consignor, and it was not claimed that it had not made reasonable efforts to do so by sending the package to Jackson. By this time, however, a return of the package to the plaintiff had become not only impossible but illegal. The company then became a bailee of the property, responsible only for the use of ordinary care. At the close of the war it was its duty to return it to the plaintiff on demand. All that the plaintiff can call upon the defendant to do is to reimburse him for the damages sustained by the neglect of the defendant. For the loss of interest during the war, and for the depreciation of the currency, the defendant is not liable, for if it had done its duty and retained the package, the same loss would have occurred; in other words, the loss of interest and the depreciation was occasioned, not by the act of defendant, but by the war. I think the jury should have been charged that the defendant was liable for the value of the package at the time when demand was made, with interest from that date. For this error the verdict and judgment must be set aside and a new trial granted.

Liability of Railroad Company for Defective Construction of Track—Measure of Damages for Death of Party.

KANSAS PACIFIC RAILROAD v. LUNDON.

Supreme Court of Colorado.

1. Liability of Railroad Company.—In the construction of its track a railroad company is bound to provide, not only for the passage of the volume of water that may be expected to flow through a particular water-way, but also for the passage of such a torrent as might accumulate there from the occurrence in the vicinity of one of the exceptionally violent storms to which the country is occasionally subject, although no reason existed to expect such a storm would ever happen at that particular place.

2. Punitive Damages.—But the neglect to provide against such an exceptional outburst is not such negligence as will justify punitive damages.

3. Measure of Damages.—The measure of damages for death of an adult male, is the probable amount of the accumulation of the deceased during the remainder of his life (if he had not been cut off) having reference to his age,

occupation, habits, bodily health and ability, irrespective of the character or wants of the beneficiaries.

Action for death of John Sodenquist, alleged to have been killed through the negligence of appellants while a passenger on their road. Verdict and judgment below for plaintiff (appellee) for $3,000. The facts are stated in the opinion.

Sayre, Wright & Butler and *I. T. Usher*, for appellants; *I. B. Smith & S. Brown*, for appellee.

The opinion of the court was delivered by Hallett, C. J.

In July, 1873, a violent rain storm occurred on the line of appellants' road, and produced a flood in a dry ravine, or arroya, and called Coon creek, which falls into Big Sandy Creek; thereby an embankment leading up to a bridge at the mouth of the arroya was washed out, and a midnight train bearing appellee's intestate as a passenger, plunged into the chasm, and the latter, with others, was killed. Negligence is not imputed to the persons in charge of the train, but the question is, whether the road was properly constructed at the place where the accident occurred. In describing the place, the witnesses speak of an old channel of the Sandy, which, with the space intervening between that channel and the new channel of that stream, formed a semi-circular basin which was traversed by the railroad proceeding from the east to west along the course of the Sandy. Into this basin on the north side of the railroad the dry channel of Coon creek came, and the channel of Sandy, which was almost as dry as its tributary, was on the south side of the railroad, and one hundred and fifty to two hundred feet distant from the latter. At bottom the basin was somewhat unequal, but the old channel was quite level; according to some witnesses it inclined slightly to the east, but not enough, probably, to affect very greatly the flow of water therein. In general elevation it was several feet lower than the surrounding country, and but little higher than the bed of Sandy. A bridge seventy feet in length was located forty or fifty feet from the east bank of the basin, apparently to allow water discharged out of Coon creek to pass down to the new channel of Sandy. Connecting the bridge with the rim of the basin at the east was the embankment which washed away, and which was made of earth taken from a cut which led up to the basin.

The evidence was clear to the point that the earth or sand used in the embankment would not resist the action of water, and, of course, it was adapted to the use which was made of it. The engineer in charge of the work when the road was constructed directed that the bridge should be located at or near the east bank, but afterwards, upon a suggestion from the person who was grading the road, he allowed it to be placed further west. Indications of water having been in the channel existed at the time the road was built, but it was not clear that any considerable volume of water had passed through the channel. One witness, who assisted in building the bridge, gave some account of a flood which occurred while he was at work there, but he was not certain as to the locality, and from other testimony it is probable that he was mistaken as to the place. However that fact may be, the witness was undoubtedly in that neighborhood, and his testimony is of some value as tending to prove that storms prevailed in that region of country at the time the road was built, and that the officers of the company knew or might have known that the road would suffer from great floods. Within knowledge of the people of the vicinage, no such storms as that which caused the disaster had occurred, nor had any such volume of water been seen in the channel of Coon creek. On the night in question it was probably five feet deep, and it flowed with a rapid current. Upon these facts, a principal question presented in the record is whether the road at the point where the accident occurred was properly constructed to resist the action of the elements upon it. That the company was bound to exercise the highest degree of care in that respect is conceded, and if the officers of the company knew or could have ascertained by diligent enquiry the danger to which the road was exposed, they were bound to guard against it. This is the principle founded upon public policy which was recognized by this court in a case which grew out of the same accident (2 Colorado, 442,) and it is supported by unquestionable authority. Floods of the volume and violence of that which destroyed the road, although infrequent, were not unknown on the plains and in the region of country where the accident occurred. One witness had some knowledge of six storms of much the same character within the territory, and another gave an account of one which occurred near the scene of the disaster at the time when the road was built. Aside from this, the fact that such storms have visited different localities, and their destructive power, is a part of the history of the country, of which we are justified in taking some notice. It is true that this peculiarity of the climate was not so well known in the year 1870, when the road was built, as it is at present, but it was then sufficiently known to demand the attention of the company.

It is true also, as the evidence shows, that these storms are erratic, rarely recurring in the same place, and usually confined to a small territory. That circumstance may be sufficient to relieve a railroad company from the imputation of negligence, which might otherwise arise from a failure to provide a sufficient water-way in places where there is no natural channel, and nothing in the topography of the country to suggest danger from water. We shall presently show that the same circumstances will often rebut a presumption of wilful misconduct in constructing the road, but it can not avail to relieve a company from the duty of providing sufficient water-ways in places where, as in the case at bar, there is a natural channel which drains a considerable territory. Experience proves that in such places large bodies of water may accumulate; and, although this does not often occur, the safety of the travelling public demands that ample provisions shall be made for it.

Referring to the evidence in this case, it is only necessary to say, in this connection, that the embankment which was washed away was manifestly inadequate to withstand a large body of water, as the catastrophe which gave rise to this suit sadly proved, and the company was negligent in placing it there. The case of Withers v. The North Kent Railway Company, 3 H. & N. 969, in which, upon facts somewhat analogous, the company was discharged, is not controlling, for in that case negligence was not shown. In a humid climate it may not be necessary to guard against such torrents as that which swept over appellant's road, but with us the necessity exists, and railroad companies should recognize it.

To these general remarks, touching the liability of the company, something should be added upon the question of exemplary damages which was submitted to the jury. Of the right to such damages under the statute, (9 Sess. 117), it is enough to say that it was recognized in K. P. R'y. Co. v. Miller, 2 Colorado, 442. But the application of the rule to cases of this kind must be with the limitations which obtain in other cases, and upon that point we have a valuable opinion from the Supreme Court of the United States. In Milwaukee & St. Paul R'y Co. v. Arms, decided at this term, degrees of negligence upon which so much learning has been expended, are entirely discarded, and it is said that a negligence alone is not to be visited with punitive damages. Wilful misconduct, or that entire want of care which would raise the presumption of a conscience indifferent to consequences is necessary to support a claim for such damages. Upon looking into this record, we are unable to see that such misconduct or want of care in the construction of appellant's road was shown. The seventy-foot bridge was shown to be sufficient to admit of the passage of all water that would in the ordinary course of nature flow down the arroya, and in view of all the evidence, the fact that the location of it was changed when the road was in process of construction, is not particularly significant. The channel at that point was nearly level from side to side, and a projecting band a short distance above afforded some protection to the eastern embankment. One engineer who was not in the company's service, thought that the western embankment was in more danger from water than the eastern. It seems that for the water which might be expected to flow in that channel after ordinary rain storms (for at other times it had none) the bridge was as well located as it would have been if placed nearer the eastern rim of the basin.

And as to the flood which destroyed the road, the officers of the company had no greater reason to apprehend that it would fall on that place than elsewhere on their long line. True, there were indications of the action of water, but probably no greater than in many other places on the road, and certainly not sufficient to indicate that such torrents were of common occurrence there. The law of these phenomena is little understood, and no one can say that a deluge will happen here or there, although there is some reason to expect it everywhere. The fault of the officers of the company appears to have been that they did not study the course of water and guard against these casual and fortuitous outbursts, rather than a wilful and reckless disregard of duty. In this we have said there was negligence, but there was not wilful misconduct, or that want of care which in the presence of a known danger is indifferent to consequences. Cases may arise presenting other features, as for instance, if no water-way should be provided in a place where one was manifestly needed, in which a different rule would be enforced, but upon the evidence in this record, we think there was no ground for punitive damages.

We come now to consider the true measure of compensatory damages in cases of this kind, a subject of great difficulty, upon which widely different opinions have been expressed. Whether the damages given by the statute are for the injury to the deceased, and as such as he might have received if he had lived, or for the loss sustained by the survivors in and by his death, is not entirely clear to the writer. But regarding the point as settled in favor of the latter proposition, by the decisions of this court, to which reference has been made, and perhaps by the weight of authority also, there is still some difficulty in ascertaining the loss of the survivors.

In many of the decisions the value of the life of the deceased is mentioned, and language of that kind is used in Miller's case, but this certainly does not mean the value of life in the abstract, for in that sense it would simply incalculable. As a matter of sentiment, life has no pecuniary value, but, considered with reference to the relations of deceased with others, it is capable of such estimate. In this sense a parent is entitled to the services of children during their minority, and to support and maintenance from them in his declining years. A husband is entitled to the assistance of his wife in the affairs of life, and a wife is entitled to support from her husband. Children may demand nurture and education from parents, and all these services may be compensated in some sort and degree by money. It is in this sense with reference to the probable benefits that would have been derived by survivors from the life of deceased if he had lived, that the phrase should be understood in the law, for otherwise, all will be left to the discretion of the jury. Pennsylvania Railroad Company v. Butler, 57 Pa. State, 335. So understood, there seems to be some doubt whether the recovery should be according to the needs of the survivors, and what they would have been entitled to demand from deceased if he had lived, or the propable accumulation of the latter to be appropriated to the use of the survivors. In a Georgia case, a widow was allowed the present worth of a reasonable support for herself, according to the expectation of the husband's life, in view of his condition and circumstances, and so also in Maryland. Macon & Western R. R. Co. v. Johnson, 38 Ga. 409; B. & O. R. R. Co. v. State, 33 Md. 542. So in California it was held upon rehearing, contrary to the opinion first announced in the same case, that surviving children

however numerous, were entitled to support and education during minority, and this was the extent of defendant's liability. Taylor v. Western Pacific R. R. Co., 45 Cal. 332. The opposite view is maintained in North Carolina. Kesler v. Smith, 66 N. C. 154. And in the case before cited from 57 Penn., it is said that the loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures. The same rule has been adopted in Iowa. Rose v. Des Moines Valley Railway Company, 39 Iowa, 247. And in Illinois, apparently with the qualifications that nothing shall be allowed if the survivors were not in any degree dependant upon deceased for support. Chicago & Alton R. R. Co. v. Shannon, 43 Ill. 339. The authorities are, however, quite bewildering, and to review them at length would be very tiresome. The rule which gives to survivors the probable earnings of the deceased, if his life had not been cut off, is strongly supported by the consideration that it is of uniform operation and effect. Under it the recovery is the same, under like circumstances, whether the beneficiary is husband, wife, child, or parent, and no reason is perceived why it should not be so. This accords with what is said in Illinois Central R. R. Co. v. Barron, 5 Wall. 104, as to the theory of these acts, and it seems to be the better rule.

Strong objections may be urged against it, but I do not perceive that any other rule is more defensible. Upon this it would seem that the view taken of the statute in the court below was incorrect; the jury should not have been required to return damages according to the filial affection and attention of deceased to his parents, for of these no pecuniary estimate could be made. The statute does not stand upon that idea, but upon the theory that in old age parents may rely upon children for support in the same way as children demand the like care in infancy from their parents. The accumulations of the deceased during the remainder of his life, having reference to his age, occupation, habits, bodily health and ability, would have furnished the true measure of compensatory damages. This is not applicable to all cases as, for instance, in the case of a child of twelve years, it is not possible to show more than the age and sex, and the circumstances and condition in life of the parents. Ihl v. Forty-second Street R. R. Co., 47 N. Y. 318; Penn. R. R. Co. v. Keller, 67 Pa. St. 305. So in the case of a wife, other data must be used, but the rule suggested seems to be applicable to adult males. For the purpose of showing the probable duration of life, the Carlisle or other approved tables may be used. Rowley v. London and N. W. Ry. Co., 8 Exclh. L. R. (1872–3) 221; Donaldson v. Mississippi and Missouri R. R., 18 Iowa, 290. If the views here expressed do not fully accord with what is said in Miller's case, it is thought necessary to modify that opinion. The evidence was stronger in that case, however, and probably we have not overruled it in any substantial point. Several questions relating to the admissibility of testimony have been examined, but any discussion of them would be unprofitable. Without deciding whether the evidence at the trial was sufficient to prove the parentage of deceased, we think that more should have been offered. Doubtless evidence to show that the alleged parents of deceased acknowledged the marital relations, and lived together as husband and wife, could have been obtained, and this should have been done.

The judgment of the district court is reversed with costs, and the cause remanded.

NOTE.—As to first point, see Great Western Railway Co. of Canada v. Fawcett, 1 Moore, P. C. C. N. S. The rule there stated is, that a railroad company in the formation of its line is bound to construct its works in such a manner as to be capable of resisting all violence of weather, which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur.

Salvage—Firemen—Vessels Lying at Wharves.

DAVEY *ET AL.* v. THE MARY FROST.

United States District Court, Eastern District of Texas.

Before Hon. AMOS MORRILL, District Judge.

Firemen employed and paid under a city ordinance, are not entitled to salvage for vessels saved while lying at their wharves, as their services are simply in the line of their duty.

MORRILL, J.—The libel charges, among a great many other things, that the vessel, on the night of the 11th of January, 1876, was fastened at one of the wharves of Galveston, receiving her cargo, there being then on board 800 bales of cotton, when an alarm of fire was sounded throughout the city and port of Galveston; whereupon libellants went immediately to the vessel, and finding a portion of the ship's lading on fire, with six steam fire engines, and firemen working under the control, direction and superintendence of libellants, promptly proceeded to extinguish the fire, and in about four hours the cargo and that portion of the ship on fire were completely submerged and the fire extinguished. It is further alleged that the "night was cold and the weather inclement; that by reason of exposure and loss of sleep the libellants were worn out with fatigue." That in order to extinguish the fire it was necessary to submerge the cargo, and, also, in order to recover the ship and cargo from the submersion, it was necessary to take out from the ship the water that had been thus put in; and that libellants did this the next day.

The master of the ship admits the extinguishing of the fire, and the necessity of it; but denies that there was any necessity for libellants' labor in pumping out the ship, and that they did not, and could not, completely do so. The master further insists, that the libellants are not entitled to salvage, because they were the firemen of the city, and as such did no more than their duty.

It seems that one of the libellants was the chief engineer of the fire department, and receives a salary as such; that the other libellant was foreman of one of the companies; and that those employed to keep the horses, and constantly on the watch, so as to take the engines to fires upon hearing the alarm bells, and also that the engineers in charge of the engines, have salaries from the city as such employees; and that the libellants, as well as most of the others engaged, were dressed in firemen's uniform. There was much more testimony, some of which will be referred to. In fact, two entire days were consumed in hearing the evidence. The libellants introduced witnesses to prove that the ship was abandoned and derelict. But in what manner a ship fastened to the wharf of a city, and receiving her cargo, even if her officers and crew should be absent from her, can be said to be *derelict*, it is difficult to understand, unless we mean by the word what is meant if a storehouse or bank should be found in a similar condition.

The first point raised by the pleading denies the ability of libellants to maintain this suit. It is, and must be admitted by all parties, that this court can not entertain jurisdiction unless it is a case of salvage, which is the first question for consideration.

"Salvage means the compensation which is earned by persons who voluntarily assist in saving a ship or cargo from peril." 1 Parson's, art. 595. "Salvage in admiralty, and generally in the law merchant, is the compensation earned by persons who voluntarily assist in saving a ship or cargo from a maritime peril." Appleton's Enc. "The relief of property from an impending peril of the sea by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage." 1 Curtis Rep. 355. "This definition quoted and adopted in" 1 Clifford's Rep. 216. "The salvage services must be performed by persons not bound by their legal duty to render them." 2 Parson's M. 599. "Courts of admiralty will not permit the performance of a public duty to be turned into a traffic or profit." 19 Howard, 160.

The foregoing quotations, taken from authorities that we are bound to respect, though somewhat different in verbiage, yet concur in one point. Hence a person engaged on board a ship, whether as common seaman, pilot, mate or captain, or in any other capacity, can not receive salvage, because whatever each and all may do in saving a ship, it is simply doing their duty. Not only so, but "in all cases of wreck or loss of vessel, proof that any seaman did not exert himself to the utmost to save the vessel, cargo and stores would bar his claim to wages." Rev. Stat. sec. 4525; 1 Parson's Mar. Law, 599. But it is not only to the officers and crew of a ship in peril that these remarks are applicable, but all others whose duty, whether of a public or private nature, requires their action. Accordingly when the sloop-of-war, Plymouth, on the 30th of September, 1846, fell in with the wreck of the Josephine on the high seas, some five hundred miles from the port of New York, drifting about at the mercy of the waves, entirely abandoned by her crew, derelict and partly plundered, and after considerable exertion by the officers and crew of the Plymouth, the Josephine was taken to New York and libelled for salvage, the claimants of the Josephine admitted the facts set forth in the libel, but insisted that the Plymouth in rendering service to the Josephine was acting under instructions from the government of the United States to render relief freely and promptly to American vessels in distress. Judge Nelson said: "Ordinary service in rescuing American vessels in distress, requiring no great hardship or peril on the part of the officers or crew, would seem to fall directly within the line of the general duty enjoined by the special instructions of the government on the subject." 3. Bl. C. C. Rep. 328.

The same principle of law applies in this case that is applicable in similar cases in daily transactions. A watchman stationed in a dwelling, hotel, bank, factory, or any other place, to guard the building against fire or robbers, and employed for that purpose, could not legally claim extra pay, should it be made to appear that the building would have been burned or robbed if he had not prevented it by his presence and exertion.

I stated to the able counsel after hearing the pleadings read, and before any testimony was introduced, that it seemed to me that the only questions were, whether the libellants were firemen, and if so, whether it was their duty as such firemen to extinguish the fire; and I am still of that opinion. The fact that one of the libellants was the chief engineer in the fire department, and as such received a salary from the city, and had entire command of the fire brigade, and that the other libellant was foreman of one of the companies; that the engines used in putting out the fire were the property of the city, and were conveyed to this and all other fires at the expense of the city, and supplied by fuel and a competent engineer at the expense of the city, there can be no doubt. While libellants admit this, they insist that there is no law or ordinance of the city requiring of them that they should extinguish this or any other fire, and that all their acts are voluntary, and though based upon a moral, yet not upon a legal obligation.

This brings us to the charter of the city and the ordinances of the city council. The portions of the charter to which I refer are as follows:

Article II. Section 1. That the limits of said city shall embrace so much of the Island of Galveston, from the point therof on the east to Fifty-sixth, or to include the league and labor of land known as the Menard Grant; provided that said league and labor shall extend beyond Fifty-sixth street; thence to include Galveston Bay and Pelican Island, and

one mile north thereof, so as to extend the police authority and jurisdiction, inclusive of Pelican Island, over all the area and territory aforesaid.

Article III. Section 1. The city council shall procure fire engines and other apparatus for the *extinguishment of fires*, and have control thereof, and provide engine-houses for keeping and preserving the same; and shall have power to organize fire, hook and ladder, hose and axe companies, and a fire brigade; and the companies so organized with such assistant engineers as may be provided for, and the chief engineer, shall constitute the fire department of the city. Each company shall have the right to elect its own members and officers. The engineer shall be chosen in such manner as said department may determine, subject to the approval of the city council, who shall define the duties of said officers, and pass such ordinances as they may deem proper for the interest and welfare of said department, and to contribute to the efficiency thereof. All officers so elected and approved shall be commissioned by the mayor; and the said companies, officers and members shall observe and be governed by the ordinances of said city relating to said fire department. Said companies shall have power to adopt their own constitution and by-laws, not inconsistent with the provisions of this act and the ordinances of said city, and said department shall take the care and management of the engines, and other implements and apparatus, provided and used for the extinguishment of fires; and their powers and duties shall be prescribed and defined by the city council.

Article V. Section 1. Every person actively serving as a fireman, or who shall have so served as a fireman in the city for a continuous term of seven years, shall be exempted from all military duty, except in cases of insurrection or invasion. A certificate of the mayor, under the city seal, shall be evidence of such exemption. The engineer and assistant engineers, and members of hook and ladder, hose and axe companies, fire brigade and fire wardens, shall be deemed firemen of this city within the meaning of this section.

The ordinances of the city provide: "An alarm of fire shall be given by ringing two or more strokes per second for the space of a minute or more on the market bell, or any church or hotel bell, in the city of Galveston, or any steamboat bell in the harbor, or the alarm bells in each ward. The fire department of the city of Galveston shall consist of the officers and members of the fire engine and hook and ladder companies now organized in this city, and of such other companies as may be hereafter organized and admitted to the fire department, under the regulations hereinafter provided. The officers of the fire department shall consist of one chief engineer, and first assistant engineer, and one third assistant engineer. The number of active members, including officers, belonging to each company, shall not be less than twenty-five men, each of whom shall be duly reported to, and commissioned by the mayor; *provided*, that each company shall have the right, at any time, as a reward for long service or other merit, to place upon a roll of retired or honorary members any member of said company whose name shall not thereafter be counted on the roll of active members, but who shall be entitled to the benefits of membership, without *compulsory* service or assessment; *and provided*, that this section shall not conflict with the number of men allowed by the state legislature to chartered companies. In case of a *fire* or other assembling of the department, the chief engineer shall assume control, and be obeyed in all things pertaining thereto. It shall be the duty of the chief engineer, or senior assistant engineer, in command at fires, to establish a post of observation, to be designated in day time by a red flag, and at night by a red lantern, at which post he shall remain during the progress of the fire, and direct the operations of the department, except when his presence at some other portion of the field is temporarily indispensable."

It is not to be questioned that a ship at any of the wharves of Galveston is within the chartered limits of the city. When the charter granted to the city provides that "the city council shall procure fire engines and other apparatus for the extinguishment of fires," it speaks not in a permissive sense, but in an imperative manner. It does not use the word *may*, but *shall*. When it speaks of the "extinguishment of fires," it refers to those fires that require engines for their extinguishment, and uses the word fire with no reference to its locality. The only boundary line to the fire engines, is the boundary of the city and accessibility. When the city accepted the charter, it accepted it with its requirements; and, when the firemen became such, they also accepted the position as fireman set forth in the charter, with such further conditions as the city council might prescribe. When the ordinances provide for the "assembling of the department in case of a *fire*, and for the chief engineer to assume control," it virtually requires such "assembling" in case of a *fire*. When the alarm bell rings, whether it be the "market bell," any church or hotel bell. or "any steamboat bell in the harbor," the firemen are not permitted either by the charter or ordinances, or their own honest impulses, to enquire what, but where, the fire is. The very instant the alarm is sounded they

"Skelpit on thro' dub an' mire,
Despising wind an' rain and fire."

No mercenary motive influences them. Like the Howard Association, the Sisters of Charity, and similar societies, guilds and institutions, scattered over this city—the more the better—they desire no other temporal reward than the consciousness of doing good.

In thus doing, the service performed, in one sense, is voluntary. But it is voluntary performance in the strict line of their duty. When the crew of a government ship saves an American ship in distress, it is not done contrary to the "*voluntas*" or will of the sailors; but since the act is done in accordance with their legal duty—that duty which is assumed when they enter the United States service—it is not in a technical sense voluntary, but required, service. When the libellants in this case assumed to act as officers in command of the firemen and fire engines of the city, in doing what the charter of the city says shall be done, they are estopped from denying they are such officers in the line of duty as prescribed by the charter.

There is another view of the case. Among the quotations from the ordinances hereinbefore stated, there is a distinction between honorary members and active members. The honorary members can be members of the company "without *compulsory* service." This is a virtual declaration that the firemen service is not voluntary in a legal sense. But I do not base the decision on this ground; but on the broad principle already stated—that the charter of the city requires and commands the city to procure these fire engines and "have the control thereof." The libellants can not have control of these engines except as officers of the city. As officers of the city, they used these engines to extinguish this fire, and were paid for their services, and not in their individual capacity; and as such officers can they sue, if at all, and not as individuals.

From the fact that there has been an unusual large number of disinterested spectators in attendance upon the trial of this case, it is to be inferred that the case is one of unusual interest. It may be proper, therefore, for me to state that, had it appeared to have been a case of salvage, the libellants would have been entitled to a very small compensation.

It is not one of those cases where danger stood threatening on all sides, and where peril of both salvors and their ships used in rescuing property from danger was imminent, which is, in most cases of salvage, a basis for reward. In many cases of salvage the same danger threatens the rescuers that visited the rescued. The only way of comparing such cases with the case before the court is by contrasting them, which we can all do in imagination. It is true, that the libellants allege that the night was cold; but the self-registering thermometer that we all have in our gardens, being the most delicate vegetation, tells us that there has not been a cold day this winter. In fact, simply leading the hose from the engines on the wharf to the ship was the principal labor of the firemen. The engines under the paid superintendence of the paid engineers did the work.

Before disposing of this case, I think it advisable to state certain principles by which admiralty courts are governed. Judge Hopkinson says: "We must not teach a salvor that he may stand ready to devour what the ocean may spare; he must not be permitted to believe that he brings in a prize of war and not a friend in distress." Decided in 1829 in Hand v. The Elvira, Gilpin Rep. 75. Treading on the heels of this decision, both as to time and matter, in 1881, in the case of the brig Nestor, Judge Story says: "No system of jurisprudence purporting to be founded upon moral or religious, or even rational principles, could for a moment tolerate the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by christian and public duty into a traffic of profit, which would outrage human feelings and disgrace human justice. 1 Sumner, 210.

In 1856 the Supreme Court of the United States, in the case of Post v. Jones, referred to this case of 1 Sumner, 210, and quoted the same approvingly, and also quoted an English case decided by one of the most celebrated of English judges, laying down as the basis of reward for salvage services: 1st. Danger to property. 2d. Value. 3d. Risk of life. 4th. Skill. 5th. Labor. 6th. Duration of service. Tested by these principles, there is little doubt but that a voluntary donation by the underwriters and others interested in the ship and cargo to the firemen, would have far exceeded in value what this court would decree, had the fire been subdued by parties in a private capacity, and owners of the engines used. But as it appears that the fire was extinguished by the machinery belonging to the city, operated by men in the employ of the city, and that they were bound by its charter to do this, the libel is dismissed.

Admiralty—General Average—Expenses of Special Agent.

HOBSON *ET AL.* v. LORD.

Supreme Court of the United States, October Term, 1875.

1. General Average—Wages of Crew during Detention for Repairs.—Where a ship is delayed for repairs, which have been rendered necessary by a peril of the sea, and which are required to enable the ship to proceed upon her voyage, although they are made in a port on the route of her regular voyage, the wages and provisions of her crew during the time she is detained may be allowed as special average.

2. Expenses of Special Agent.—Services and expenses of special agent sent to assist the ship in the port of distress may also be allowed.

In error to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice CLIFFORD delivered the opinion of the Court.

Sacrifices, voluntarily made in the course of a voyage, of part of the ship or part of the cargo, to save the whole adventure from an impending sea peril, or extraordinary expenses incurred for the joint benefit of both ship and cargo, and which became necessary in consequence of a common peril of the kind, are regarded as the proper object of general average.

Average, of the kind mentioned, denotes that contribution which is required to be made by all the parties to the same sea adventure, towards a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, by some of the, parties for the common benefit, to save the ship and cargo from a impending peril. Property not in peril, requires no such sacrifice, nor that any extraordinary expense should be incurred, and property, not saved from the impending peril, is not required to pay any portion to such a loss or expenditure, nor do *ordinary*, losses or expenditures entitle a party to claim any such contribution from the associated interests of the adventure, from which it follows that the ship and cargo must have been in peril, and that the sacrifice must have been of a part of the ship or cargo to save the residue of the adventure, or that the extraordinary expenses must have been incurred for the joint benefit of the ship and cargo, and which became necessary in consequence of a common peril. Where there is no peril such a sacrifice presents no claim for such a contribution, but the greater and more imminent the peril the more meritorious the claim against the other interests, if the sacrifice was voluntary, and contributed to save the adventure from the impending danger to which all the interests were exposed. Star of Hope, 9 Wall. 229. Fowler v. Rathbone, 12 Id. 114. McAndrews v. Thatcher, 3 Id. 370.

Expenses to a large amount were incurred by the plaintiff in repairing the ship Lincoln, of which he was the owner, during her voyage from one of the guano islands to Hampton Roads for orders. Her outward destination was to that island for a cargo, and she went there and received on board one thousand one hundred and ninety-two registered tons of guano, and sailed from the island on her return voyage.

Vessels loading there, if bound to the United States, are required to touch at Callao for a clearance in the homeward voyage. Clearances are not granted at the island, and she accordingly sailed for her return destination without one, intending to call at Callao for that purpose, but on the way she was badly injured by a collision with another vessel, and being in distress and unable to prosecute her voyage, by reason of such injuries, she proceeded to the port of Callao, which was her nearest port, and there came to anchor, in the anchorage where vessels usually anchor when they call at that port for a clearance.

Surveys of the ship were had, and it was found that she was so damaged by the collision that it was necessary to remove her cargo and repair the vessel before the voyage could be prosecuted, and it appears that it was necessary, in order to accomplish those objects, to remove the vessel from the place where she was anchored, to another, a mile and a half nearer the mole or pier, to be repaired. Heavily laden, as the ship was, the repairs could not be conveniently made without first unloading the larger portion of the cargo, and with that view the ship proceeded first to a hulk, at anchor a mile nearer the mole, and there discharged all of her cargo, except two hundred and fifty tons, before she went to the dock to be repaired. All the repairs ordered by the surveys were made, and it appears that all the steps taken to place the ship in the dock were judicious and necessary and proper to execute the required repairs. Extensive repairs were made, and the finding of the court shows that the repairs, though they were of a permanent character, were necessary to enable the ship to prosecute her voyage to its termination, and that the ship, when the repairs were compleated, was removed from the dock, proceeded back to the hulk, was reloaded with the cargo paeviously discharged, except forty-five to fifty tons, and that she successfully completed her voyage to her port of destination, where the cargo was discharged and delivered to the defendants, who were the consignee of the cargo.

Service was made, and the defendants having appeared, the parties waived a jury and submitted the case to the circuit judge without a jury. Hearing was had, and the court rendered judgment for the plaintiff in the sum of eighteen thousand four hundred and thirty dollars and forty-three cents. Immediate measures were adopted by the defendants to remove the cause into this court for re-examination.

Errors are assigned as follows: 1. That the circuit court improperly allowed the wages and provisions of the crew as a general average during the period the ship was delayed for repairs. 2. That the circuit court improperly allowed as a general average the sum paid by the plaintiff for the services and expenses of the special agent sent to assist the vessel in the port of distress.

Matters of fact need not be discussed, as they all agreed or are embraced in the special findings of the court. Safe arrival and delivery of the cargo are admitted, and it appears that the defendants, before the delivery of the cargo, gave to the plaintiff an average bond, in which they promise and agree to pay to the plaintiff their respective proportions of the expenses, charges, and sacrifices made or incurred by the plaintiff during the detention of the vessel for repairs, in consequence of damage received by a collision with another vessel while proceeding towards Callao for a clearance, payment to be made whenever and so soon as the average shall be adjusted conformably to law and the usages of the port of New York.

Most of the material matters of fact are embraced in the special findings of the court, as follows: That the ship, on her voyage to Callao for clearance and orders, was seriously damaged in consequence of the collision; that she reached the port where she was to touch in the damaged condition described in the surveys exhibited in the record; that she was in distress, and unable to prosecute her voyage; that in consequence of the peril it was necessary that she should be unladen and be extensively repaired; that the repairs were necessary in order to enable her to prosecute her voyage, and that by means thereof the voyage was prosecuted; that the repairs were made and that the vessel was re-loaded with reasonable dispatch; that by reason of her damaged condition she was compelled to leave her first anchorage ground, discharge her cargo at the hulk, about one mile from the place of her anchorage, and then to proceed to the dock for repairs, a half-mile more distant from the anchorage than the hulk; that the services of the seamen employed during the repairs of the vessel were necessary for her preservation and safety and the prosecution of the voyage, and that the amount expended for their wages and provisions was a reasonable amount, and that the expenses and salary of the special agent sent to assist the ship at the port of distress are the subject of general average, according to the customs of the port of New York.

Expenses incurred of the character mentioned, or sacrifices made on account of all the associated interests by the owners of either, to save the adventure from common peril, constitute the proper objects of general average, and the owners of the other interests are bound to make contribution for the same in the proportion of the value of their several interests, if it appears that the expenses or sacrifices were induced or occasioned by an impending peril, apparently imminent; that the expenses or sacrifices were of an extraordinary character; that they were voluntarily incurred or made, with a view to the general safety of the adventure, and that they accomplished or aided, at least, in the accomplishment of that purpose. Claims of the kind have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests, shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice.

Suppose that is so, still it is contended by the defendants that the expenses incurred for the wages and provisions of the crew, and the amount paid for the salary and expenses of the agent sent by the plaintiff to assist the ship in the port of distress, were improperly included in the adjustment. They object to the charge of wages and provisions for the crew, and insist that such a charge is never general average, except when the ship, in a proper case of imminent peril to vessel and cargo, or to the voyage, voluntarily and to escape the peril, leaves the regular course of her voyage and bears away to a port of refuge for repairs; and they advance the theory that wages and provisions, during any other detention, though the ship may be disabled by perils of the sea, are not general average, because the expenses incurred, as they insist, are not given or sacrificed, for the common benefit, but that they are bought and paid for by the freight stipulated for the voyage, and that the ship, in her delay for repairs, only complies with her contract made with the shipper.

Admit the proposition of the defendants, and it follows that a claim for general average can never be maintained in any case nor for any sacrifice or expenditure unless the injured ship bears away and goes to a port of refuge, not in the course of her voyage. Ships going out or returning from an outward voyage are sometimes disabled by collision or storms in the outer harbor of the port of departure or of the return destination, and they are sometimes disabled in the course of the voyage in the outer harbor of the port where they are accustomed to call for funds or advice, or for wood, coal provisions, or water; but if the rule of decision, set up by the defendants, should be adopted, no party in such a case can ever be entitled to maintain a suit for general average unless the ship bears away and goes to some other port, as a port of refuge for repairs, not even if she was voluntarily stranded to escape a much greater peril, and thereby became unable to move in any direction whatever.

Such a rule of decision is wholly inadmissible, as in many cases it would divest the claim of much or all of its equity and make it depend upon an act entirely unimportent and wholly unnecessary. Navigators whose ship is injured by collision or perils of the sea, should bear away to a port of refuge for repairs, whenever the circumstances require it, but it would be a mere act of folly to do so in a case where the disaster to the ship happened in the harbor of a port where the necessary repairs could be as conveniently and economically executed as in a more distant port, out of the regular course of the voyage. Both commercial usage and law allow compensation of such a voluntary sacrifice or extraordinary expenditure, not because the ship at the time bore away to a port of refuge outside of the course of her voyage, but because she was *interrupted* in the course of her voyage by the disaster, and because common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the imminent danger, or incurs extraordinary expenses to promote the general safety of the associated interests, the sacrifice or expenses so made or incurred shall be assessed upon all in proportoin to the share of each in the adventure.

Property at sea, as all experience shows, is often exposed to imminent perils, arising from collision and fire, as well as from the violence of the wind and waves. Navigation at best is a perilous pursuit, and all those who follow it know full well that the owners of ships and cargoes frequently suffer disastrous losses in spite of every safeguard and precaution which they can adopt. Equitable rules and regulations designed to avert the consequences likely to ensue from such perils, or to ameliorate the loss in case of disaster, have long been known in the jurisprudence of commercial countries, which, being founded in the principles of equity, are entitled to be administered in the same spirit in which they had their origin.

Marine insurance, is a system of that sort, and it had its origin as a measure to afford partial indemnity to the unfortunate for losses by such disasters. Allowances for salvage service are of a similar character, and the rule of proportionate contribution of sacrifices made to escape from an imminent sea peril or extraordinary expenses incurred for that purpose is one of equal merit and importance. Where the disaster occurs in the course of the voyage, and the ship is disabled, the necessary expenses to refit her to go forward, create an equity to support such a claim just as strong as a sacrifice made to escape such a peril, if it

appears that the cargo was saved, and that the expenses incurred enabled the master to prosecute the voyage to a successful termination. Contribution is enforced in such a case, not because the ship when injured bore away to a port outside of the regular course of the voyage, but because the principles of equity, common justice, and the usage of commerce require that what is given by one of the associated interests "for the benefit of all, shall be made good by the proportionate contribution of all." McAndrews v. Thatcher, 3 Wall. 367. Barnard v. Adams, 10 How. 270. 2 Arnould on Ins. 784.

Equity requires that in such a case those whose effects have been preserved, by the sacrifice or extraordinary expenditure of the others, shall contribute to such voluntary sacrifice or expenditure, and commercial policy as well as equity favors the principle of proportionate contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the adventure and the lives of those on board from impending destruction. Such an owner, under such circumstances, has a lien upon the property saved, from the imminent peril, to enforce the payment of the proportionate contribution for the sacrifice made or the extraordinary expenses incurred.

Proper repairs were made in this case, and the ship having been refitted and re-loaded, prosecuted her voyage to its termination. Safe arrival, with the cargo on board, is admitted, and it appears that the owner of the ship demanded the payment of the proportionate contribution before delivering the cargo, and that the defendants, in order to obtain such delivery, gave the plaintiff the average bond exhibited in the record. Enough appears in the terms of the bond to show that the defendants did not controvert the right of the plaintiff to claim a proportionate contribution. Instead of that, the recital admits the collision; that the ship sustained damages which made it necessary to discharge the cargo and refit; that sundry expenses and charges were incurred, and that various sacrifices were made which are the subject of a general average, and which should be borne by the property at risk as a common charge in contribution.

Nothing could be more explicit than the language of that recital, and the defendants promise and agree to pay to the plaintiff whatever sums may be found due from them for their proportion of such expenses, charges, and sacrifices as have arisen in consequence of the disaster, whenever and so soon as the average shall be adjusted conformably to law and the usages of the port of New York. They admit the disaster, that sacrifices and expenses were made and incurred, that the sacrifices and expenses are the subject of general average, and promise and agree to pay the proportionate contribution so soon as the same shall be adjusted conformably to law and the usages of the port where the voyage ended. Plainly they admit that there is no merit in the present defence, for if it be true that such a claim can not arise unless the vessel bears away to a port of refuge outside of the regular course of her voyage, then it follows that the plaintiff is not entitled to recover anything. Inconsistencies of the kind can not be overlooked in such an investigation, as they tend very strongly to show that the defence is unsound, both in law and fact.

Judgment was rendered in the case for the plaintiff, and it is now admitted that the judgment is correct, for the sum of fourteen thousand and seventy-five dollars and seventy-seven cents, including interest, whereas if the defence set up to the two sums in controversy is a valid defence, the plaintiff is not entitled to any contribution whatever. Expenses during the interruption of the voyage, incurred by the master for the wages of the officers and crew, to the amount of three thousand nine hundred and seventeen dollars and eighteen cents, were also allowed by the circuit court and were included in the judgment, and those expenses, in the judgment of the court, are just as proper as the charge for the expenses of unloading and re-loading the cargo, which, it is admitted, is a proper charge.

Temporary repairs of damages arising from extraordinary perils of the sea, made at some intermediate port, for the purpose of prosecuting the voyage, if the damage to the ship was of a character to disable her and to interrupt the voyage, are the proper object of general average. Phillips on Ins. 5th ed. sec. 1,300. Repairs in such cases, if necessary to remove the disability of the ship to proceed on her voyage, are now everywhere regarded as the proper object of proportionate contribution, but expenses incurred for repairs, beyond what is reasonably necessary for that purpose, are not so regarded, because it is the duty of the owners, except in case of disaster, to keep the ship in seaworthy condition. Fowler v. Rathbone, 18 Wall. 117. Star of Hope, 9 Id. 236.

Sea perils which result in damage to the ship to such an extent as to interrupt the voyage and disable her from pursuing it, necessarily involve delay and extraordinary expenses, and this court held, in the case last cited, that the wages and provisions of the officers and crew in such a case are general average, from the time the disaster occurs until the ship resumes her voyage, unless it appears that proper diligence was not used in making the repairs.

Necessary repairs to the ship, except to the extent that such repairs are required to replace such parts of the ship as were sacrificed to save the associated interests, or to refit the ship to enable her safely to resume the voyage, are not to be included as general average by the adjuster, but the wages and provisions of the officers and crew during the consequent and necessary *interruption* of the voyage, occasioned by the disaster, are a proper charge for such proportionate contribution, wholly irrespective of the question whether the ship bore away for repairs to a port of refuge outside of the regular course of the voyage, or whether the necessary repairs were executed in the port where the disaster occurred. Masters may well consult convenience and economy in selecting the port for making repairs, and if in the particular case the master exercises good judgment in making the selection, no interested party will have any right to complain.

Argument to show that the services of the crew were necessary, during the period the voyage was interrupted, is quite unnecessary, as the findings of the court dispose of that question in the affirmative, from which finding it appears that as many men as were employed on board were actually necessary for the safety of the ship, in hauling her to and from the hulk on surf days, and in moving the ship while in dock during the repairs. Apart from that, the court also finds that it was necessary that the men employed should be sailors, able to haul the ship out at any moment when there was surf, and that the services of the sailors employed during the repairs of the vessel were necessary for her preservation and safety, and to refit her for the prosecution of the voyage.

Where the disaster occurs in the open ocean, away from any port where repairs can conveniently be made, it often becomes necessary that the ship shall bear away to a port of refuge, more or less distant from the usual course of her voyage, and it is unquestionably correct to say that the deviation in such a case is justifiable. Reported cases of the kind are quite numerous, and courts of justice, in disposing of such controversies, not infrequently refer to the bearing away of the ship as *marking the time* from which to compute the extraordinary expenses incurred in refitting the ship to prosecute the voyage. Examples of the kind are found in the decisions of this court, of which one of a striking character may be mentioned, where the court say that the wages and provisions of the master, officers and crew are general average from the time of putting away for the port of succor, and every expense necessarily incurred for the benefit of all concerned during the detention. Star of Hope, 9 Wall. 236.

Reference to the bearing away of the ship is there made solely to *mark the time* when the expenses commenced to be general average, as is obvious from the fact that the court proceed to decide, in the same opinion, that wages and provisions in such a case "are general average from the time the disaster occurs until the ship resumes her voyage," which is the true rule upon the subject, if proper diligence is employed in making the repairs. Numerous examples of the kind might be given, but it is unnecessary, as there is no well-considered case where it is held that sacrifices made by one of the associated interests for the benefit of ship, cargo and freight, to escape an imminent sea peril, or that extraordinary expenses incurred by one of the interests in such a case for the benefit of all, to refit the ship, if disabled, to prosecute the voyage, are not the proper objects of general average, unless the ship bore away to a port of refuge outside the usual course of her voyage.

Decided cases are referred to by the defendants, which they insist support that proposition, but the court here, after having examined each one of the cases, is entirely of a different opinion. Even the case of Potter v. Ins. Co., 3 Sum. 38, does not sustain the theory of the defendants. In that case the voyage was from New Orleans to Tampico, and it appearing that the repairs could not be made at the port of destination, if the vessel should proceed there, the ship put back to the port of departure, but the case warrants the conclusion that the result would have been the same, if the vessel had gone forward and been repaired in the port of destination.

Average contribution in such cases is allowed to the party making such sacrifice or incurring such extraordinary expenses, as a measure of justice for a meritorious service, to distribute among all who were benefited by it a due proportion of what was sacrificed or expended, the principle being that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice.

Peculiar remedies, equitable in their nature, are given to persons engaged in navigation and marine adventures, for the reason that such pursuits are exposed to extreme dangers and stand in need of such peculiar and equitable remedies. Contracts of marine insurance are enforced to indemnify the owner of such an adventure from a portion of his loss. Services of salvors are liberally rewarded to encourage the hardy mariner to encounter such risks to save the property invested in such an adventure, from complete destruction. Proportionate contribution is enforced by courts of justice, in cases like the present, not because the ship bore away from the course of her voyage, but because common justice requires that sacrifices made, and expenses incurred, by one of the associated interests for the benefit of all, should be borne by all, in due proportion to the interests saved by the sacrifice or expenditure. Contributions of the kind for expenses incurred to pay for wages and provisions of the crew, except in a very limited class of cases, are not enforced in the courts of the parent country. Their decisions in that regard, therefore, are not applicable to the present question, but in all other respects the rule of decision in the two countries is substantially the same. Such a condition to the right of recovery as that set up by the defendants, finds no support in any reported decision in the tribunals of that country. Moran v. Jones, 7 Ell. & Bl. 532.

It appears in that case that the voyage was from Liverpool to Callao for a cargo of guano, and that the ship was driven on a bank by a storm, near the port of departure; that her cargo was discharged and transported back whence it came; that the ship was subsequently got off and taken back to the port from which she departed, and then repaired, when she was re-loaded with her cargo and proceeded on her voyage. Attempt was made in that case to maintain that the cargo was not liable before she was got off, but the whole court, Campbell, Chief Justice, giving the opinion, held that the saving of the ship and the cargo was one continued transaction, and that the expenses incurred were general

average, to which the ship, freight and cargo must contribute. Most of the expenses in that case were incurred in getting the ship off the bank, and the rest were incurred in the port of departure, and it never occurred to court or counsel that the plaintiff could not recover because the ship did not bear away to a port of refuge. Ins. Co. v. Parker, 2 Pick. 8; Merithew v. Sampson, 4 Allen, 194; Patten v. Darling, 1 Cliff. 262.

Exactly the same rule was laid down in the Court of Appeals of the state of New York. Nelson v. Belmont, 21 N. Y. 38. Various questions were considered in that case, but the court laid down the rule that where the expenses are incurred or the sacrifices voluntarily made for the safety of the ship, freight or cargo, a general average will take place, provided the purpose of the sacrifice or expense is accomplished.

"Such a cause of action," says Kent, "grows out of the incidents of a mercantile voyage:" and he adds that the duties which it creates apply equally to the owners of the ship and of the cargo, and he characterizes it as a contribution made by all parties concerned, towards a loss sustained by some of the parties in interest, for the benefit of all; and he remarks that it is called general average, because it falls upon the gross amount of ship, cargo and freight. Ship, cargo and freight, are undoubtedly required to contribute in such a case, and the same learned author holds that the wages and provisions of the crew, if the ship is obliged to go into port to refit, constitute the subject of general average during the detention; which, beyond all doubt, is the settled rule of the courts in this country, state and federal. Barnard v. Adams, 10 How. 307; 3 Kent. Com. 12th ed. 235; Barker v. Railroad, 22 Ohio St. 62; Lyon v. Alford, 18 Conn. 75; Nimick v. Holmes, 25 Penn. St. 373; Emerigon, 482; Hallet v. Wigram, 6 C. B. 603; Dilworth v. McKelvy, 30 Missouri, 155; Abbott on Ship, 497; Hathaway v. Ins. Co., 8 Bosw. 59.

Maritime usage everywhere is that the port of destination or delivery of the cargo is the port where the average is to be adjusted. 4 Phil. L. Int. 641; Simonds v. White, 2 B. & C. 811; Pars. on Con. 6th ed. 332; Dogleigh v. Davidson, 5 Dowl. & R., 6; McLoon v. Cummings, 73 Penn. St. 108.

Universal usage designates the port of New York as the place where the adjustment should have been made, and inasmuch as the parties so agreed in the average bond, further remarks upon the subject are quite unnecessary; and the court is of the opinion that expenses incurred for the wages and provisions of the crew were properly included in the average adjustment.

Discussion of the second objection to the adjustment is not necessary, as the defendants are concluded by the finding of the circuit court. Among other things the circuit court found that, when the owner of the ship sends out an agent to a foreign port, into which the ship has put in distress, to advise and assist the master, for the benefit of ship and cargo, the usage of the port of New York is that the amount paid for the services of such agent, and his board and travelling and incidental expenses are allowed in general average, without regard to the question whether or not he reaches the port of distress in time actually to render service; provided he is sent out in good faith, with the intention that he shall render service for the general benefit. It appearing that the adjustment was made in conformity to the usage of the port in that regard, the court is of the opinion that the charge was properly allowed, and that there is no error in the record.

Judgment affirmed.

Mr. Justice BRADLEY, dissenting.

I dissent from the judgment of the court in this case. It seems to me a dangerous precedent to allow contribution to the crew's wages when a ship does not deviate from her course, but is merely delayed for repairs on the route of her regular voyage. Such claims will too often be put forward, and a shipper will never know when he has done paying freight for the transportation of his property. I concede that the American rule is more liberal in this respect than the English, but I think it has never been carried so far as the present case.

Life Insurance—Forfeiture for Failure to Pay Interest on Note.

[To the editor CENTRAL LAW JOURNAL.]

No question now pending in doubt is of such interest to the profession especially devoted to the law of insurance, as the effect on an otherwise non-forfeitable or secured life policy of a failure to pay the interest on a premium or loan note. Some of the companies insist that such failure works an absolute forfeiture of the policy as well as the ratable shares of the surplus, and the accumulated reserve. The courts have varied in their decisions, though it has seemed to me that the better opinions and the decided weight of authority have been in favor of preventing a forfeiture for the failure to pay such interest. This question is of far greater importance than the other doubtful question as to the effect of the war upon southern holders of life policies who were unable, because of the war, to pay their premium. That question is accidental and may never come again; this is fundamental and will remain as long as life insurance is practiced. Of the many decisions on this question, none have attempted to give the theory of insurance, and not one is therefore entirely satisfactory. The contract of life insurance is *sui generis*, and no analogy will lead to a correct conclusion on any question of forfeiture on account of failure to pay a premium, or the interest on a premium note.

With your permission, I will state an outline of the theories and the practices as well, of life insurance, from which a plain principle may be deduced which, in my opinion at least, should govern courts in deciding the particular question above. I am moved to do this by the decision of Judge H. B. Brown (3 CENT. L. J. 354), in the United States Court, Western District of Tennessee. It seems to me to be singularly narrow and lacking much of grasping the principles involved. I have seen no opinion so entirely unsatisfactory. It is based on argument glaringly uninformed of the theory and practice of life insurance, and therefore unequal to the principles involved, and blind to the equities presented. Presuming that such of the profession as are sufficiently interested in the question to have noted the decisions as published, are familiar with the decisions—for which we are all under obligations to this journal for promptness and accuracy—I will not cite or quote from such cases. Nor is is it necessary to follow the opinion of Judge Brown in detail. It will be sufficient to show that it must be wrong, if any thought is given to the theory and practice of life insurance, or any care felt for the equities of a case affected by that theory and practice.

I. The policy is a contract between a mutual life insurance company and one of its members. It may be called a certificate of membership, and with the receipts appended is a memorandum of deposits. Such a company is a sort of insurance partnership for mutual assistance. There is in it no idea of speculative profits. Every member is to receive full value for every dollar he contributes, and no more. No action of his can increase, and no action of the company (*i. e.*, of the other members), can lessen the benefits to him of membership. Such an effort on his part, or on the part of the others against him, would be a fraud, and *theoretically* there is perfect good faith in all parties. The policy has the amplest provisions protecting the other members from any fraud on the part of the individual policy holder, but unfortunately for him it has very slight and generally vague provision protecting him as against the other members. It is as well known as any uncertain human event may be, that out of ten thousand men of a given age, a certain number will die every year. The probability of death or the expectation of life to any one of the ten thousand may therefore be calculated with absolute certainty. The amount each must pay to produce a given sum, say $10,000, at death is therefore simply a matter of arithmethical calculation. As the probability of death each year increases, and the number of those contributing each year diminishes, the amount each survivor will pay must every year be increased a little, until at the end of the expectation of life each survivor would pay at the beginning of the year $10,000, less one year's interest at the fixed rate. For illustration: ten thousand men at the age of forty each desires $10,000 insurance for one year. By the mortality tables it is ascertained that a certain number of them will die during the year. Suppose this number to be one hundred. It will require $1,000,000 to pay the losses each one will, therefore, have to contribute $100. At the beginning of the next year, if each of those remaining desires $10,000 insurance for another year, the contribution of each must be a little more, because there are not so many to contribute, and because the death rate will be greater. The sum annually contributed will therefore increase. This is insurance pure and simple. The premiums arranged for are the net premium, no calculation being made for expenses of management, and no reserve being necessary.

If the ten thousand men at the age of forty should each desire $10,000 life insurance for life, for which they wish to pay a regular sum annually, it would be necessary for the actuary taking the life tables and considering the probability of death to each one for the entire period of probable life to calculate what sum should be paid annually by each, to produce to the heirs of each $10,000 as they may die, until all are dead, interest being calculated at a rate safely low. It then appears that in a regular or level premium the insurant is required to contribute a sum each year, for many years, far in excess of the sum needed to pay the death rate of those years. The account with each insurant is kept separately, and at any year there must be in the hands of the treasurer an accumulated sum credited to the insurant, which is made up of the excess of payments over the death rate, and which is reserved to pay premiums when the number of his class is small and the death rate accelerated. This in theory and in fact is a liability of the company to the insurant. In insurance parlance this sum is called the reserve, and it is as much the individual property of the insurant as a deposit in a savings bank would be. If the insurant should withdraw this sum and quit the company, he would not weaken the company or affect the rights of any other member any more than the withdrawal of a deposit in a bank, weakens the, bank or affects the rights of any other depositor. In the one case, the number among whom losses may be averaged is lessened, and in the other, the number of depositors on the average of whom the bank calculated in making loans is lessened. The rights of the insurant and of the depositors are identical. This court says as others equally misinformed have said, that "the prompt payment of premiums is the very essence of the contract of life insurance." This is a partial statement. *The very essence of the contract of life insurance is that the insurant shall maintain a sufficient reserve to his policy.* As long as he does this, the contract secures the rights of all parties, whether premiums be paid promptly or not. If he ceases to pay premiums at the end of any year the principal sum of his policy may be rated down every year until his reserve accumulated is exhausted in supplying insurance. Or a calculation may be made at once and such a fixed sum secured to him as is ratable and equitable, or the reserve may be returned to him in money. Other methods of applying the reserve may be adopted, but *it is the very essence of the theory of life insurance that there is no forfeiture—no dollar contributed for which value is not received.*

This is a showing of the net premium of insurance. This must be increased beyond the actuary's first calculation by an amount (1) to pay the expenses of managing the business of the company; and (2) to provide, as a matter of caution, for a loss greater than the mortality table indicates, should an epidemic occur. These additions swell the pre-

mium largely. The first addition is presumably exhausted each year. Or if it is not, it goes into the other addition at the end of the year creating the surplus. This is theoretically returned to the insurant by way of dividends. But the surplus thus created is never totally divided. It appears then that a dividend is therefore the return to the insurant of a portion of the sum which he had contributed in excess of the sum necessary (1) to pay the death losses each year; (2) to provide the reserve necessary to pay the premium when the risk is greater, and the number of his age contributing is less; and, (3) to pay the necessary expenses of the company. It should be noted that in some companies the premiums may be paid one-half in cash and the other half in notes upon which the interest is paid in advance, so as to make it equal to a cash payment.

II. Now, apply this to every given case, the one last decided, for instance. The statement of the case in the opinion is so meagre that a calculation of the reserve can not be made. To do this the age and method of payment, whether in a given number of years, or for life, should be given. The opinion is silent as to these matters. All we know is that on the 15th of October, 1867, William C. Anderson took a policy in the Saint Louis Mutual Life Ins. Co. for $10,000, for which he was to pay an annual premium of $490, one-half of which, $245, he paid, and gave his note for the other half, on which he paid one year's interest in advance. October 15, 1868, he made a similar payment of $245, and executed a similar note of $245, on which, and the other note, he paid the interest in advance. At the beginning of the third year, October 15, 1869, the calculation of the excess of his payments over the death rate and the expense account is made, and a portion of that is returned to him as a dividend. The account stands thus, (as the company presents it):

Two notes outstanding	$490.00
Less dividend	87.45
Balance of notes	402.55
Add note for 3d year	245.00
Total notes	$647.55
Interest due on those in advance	$ 38.85
Cash premium 3d year	245.00
Total cash paid	$283.85

This is the way the company makes up the account as printed in the opinion. To which the insurant Anderson is "held as assenting." In passing, I may say that this is unique reasoning in aid of a forfeiture. The company makes up the account, crediting the dividend to the principal of the notes, though the law directs that a payment or credit should first be applied to interest. Just how he could have dissented to this method of keeping an account, and the force of a dissent when the payment required was not enlarged or diminished by this method, are matters not clear to my mind. If he had dissented, it would have seemed a formal and foolish thing.

Suppose, now, that no more premiums are paid, and that the insurant died in 1872. How does the account stand? Inasmuch as the interest on the notes was paid in advance, the company has had the equivalent of three annual premiums cash, $1,470.00. The insurant owes notes, $647.55. There will be a dividend due the 15th day of October, 1870, which may safely be calculated as greater than the interest to be paid in advance on the notes. If the age of the insurant and the method of his payments were given, the reserve credited to the policy could readily be known, and with a full showing of the surplus, perhaps the ratable share of it could be approximated. These sums, the reserve and the ratable share of the surplus, are not needed by the company to meet obligations to other members. Every other member is amply provided for. The only deduction any actuary has ever thought of claiming should be made is of a sum to provide a substitute for the member withdrawing. Allowing this to be true, the sum would be small. *There is then in the treasury of the company this reserve, and ratable share of the surplus credited to the insurant exactly as a deposit in a bank would be, and which he has the equal right to withdraw.* If the policy was issued about the age of fifty, and the premium was payable annually, as I presume was the case, though the opinion does not definitely speak as to these things, there would be a reserve in the treasury of the company credited to this policy, and needed for no other purpose, of about $675.

III. What is the equity of this case considered with reference to the policy, or without reference to it? Would it not be expected that a court would secure this sum, so clearly the property of the insurant, either by giving him full value for it in insurance, or by returning it to him with interest, if any interpretation of the policy will permit it? And if a policy should be written in such flagrant disregard of the rights of insurants as to deny any right to the reserve or to value in insurance for it, would not a court of equity disregard the terms of the policy, as it would disregard the contract of a common carrier attempting to provide against responsibility for gross negligence, and do substantial justice?

Let us see the terms of the policy, and see if it may not be interpretated so as to save the rights of the parties mutually. The policy provides that "if the two first annual premiums shall be paid, and default shall be made in the payment of any premium hereafter to become due, such default shall not work a forfeiture, but the amount insured shall be commuted or reduced to the sum of the annual premiums paid." According to this there would be due to the beneficiary of the policy $1,470, from which of course there would be deducte l the amount of the notes, $647.55. This under the condition on the note that "the policy and all payments or profits which may become due thereon, are hereby pledged and hypothecated to said company for the payment of this note." It would equally follow without that condition. The interest on the notes would in all probability be paid by dividends. If not so paid, it is here provided for as securely as is the principal.

The amount to be paid would by this seem to be simply a matter of calculation, and by a calculation which perfectly saves to the beneficiary of the policy and to the other policy holders every right. But the policy also provides that the interest on the notes shall be paid annually in advance, or the policy shall cease and determine. That is to say, that although there may be a dividend greater than the interest, yet the interest must be paid entirely irrespective of this. This clause is utterly repugnant to the other clause, and the court is called on to say which shall govern. It would not seem to be a difficult question. The court in the case in criticism, cited, though apparently with but a dim understanding of the citations, freely from Story. Sec. 1314. "Whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case, the true test by which to ascertain whether relief can or can not be had in equity, is to consider whether compensation can be made or not." This would seem to give a rule clear enough. But parts of succeeding sections are quoted, to the effect that "courts of equity in cases of the non-compliance of the stockholders with the terms of payment of their instalments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture." This can not qualify the preceding. This is a special reference to public speculative corporations, between which and a mutual life insurance company there is not the slightest analogy that could make this rule applicable. If the court had made farther researches into Story, another and absolutely conclusive section would have been found, which is so entirely applicable as to "cover the case." Section 1316.

"The true foundation of the relief in equity in all these cases is, that as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that in justice he is entitled to. And notwithstanding the objections which have sometimes urged against it, this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity, there is no ground to say, because a man stipulated for a penalty in case of his omission to do a particular act, (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said, that it is his own folly to have made such a stipulation, it may equally well be said, that the folly of one man can not authorize gross oppression on the other side. And law, as a science, would be unworthy the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning and gross violation of the principles of morals and conscience, on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contracts, than in other solemn acts of parties, which are constantly interfered with by courts of equity, upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any part, to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground, that a party having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."

This would look awkwardly and read out of harmony presented in such an opinion as that of Judge Brown. This gives the spirit that should guide a court in such cases. The provision as to payment of interest in advance must be construed so as to permit the other clause securing the commuted sum to stand. If one or the other is to be disregarded, that one should be disregarded which will still allow full compensation to be made for the breach of the other. If any construction can be given which will secure all the rights of all parties concerned, and save the forfeiture, the court should adopt it. The court in this would be aided by the clause cited from the note, that the policy is pledged and hypothecated to secure its payment. Interest follows principal. If the principal is thus secured, the interest is equally secured, and while there is security for both, there can be no forfeiture because either is not paid, or not paid in a particular way established by a custom, and especially where the custom violates a rule of law.

To me it seems quite unnecessary to go further in reviewing the case, or in showing that it was wrong. If courts sit to do substantial justice between parties, this decision can not stand. I can not think that any fair court knowing what the life policy is—understanding the theory on which it is taken, will hesitate to protect the holder of it. The cases involving this question seem all more or less in a fog, and they will ever be befogged until the principle of the policy is studied and understood. I can not think that Judge Brown on such study will affirm this case.

If the court will bear in mind:

1. That a life insurance company is not for speculation, and a life policy is not a matter involving any risk to the company; 2. That the premium paid is not needed if it be not earned; 3. That there can never be a dollar forfeited without an injustice done; 4. That a policy should therefore be interpreted according to its intention and with a view to all the rights of the parties, and not according to its terms; if the court will do this there can not in my opinion ever be another decision such as this.

In addition to cases already cited, and the various cases and notes published in the journal, I will call attention to the case of Irene E. Bigelow v. The State Mutual Life Insurance Company of Worcester, just published in the insurance press (Chronicle, N. Y., June 1), in which the terms of a note which affected a forfeiture were utterly set at naught by the Supreme Court of Massachusetts. I hope to see the opinion in full, and the opinion to the same effect in Hull v. Northwestern Mutual Life Ins. Co., Supreme Court of Wisconsin, in the JOURNAL. at an early day.

JOHN A. FINCH.

Correspondence.

FUSTIAN AND FUSS.

[To the editor of the CENTRAL LAW JOURNAL].

Do not public journals, on both sides of the Atlantic, seem to manifest a sort of strange proclivity to embrace the side of their respective governments, without for a moment considering the actual, or even the politic, right of the matter?

The question of extradition is best understood by lawyers. And to illustrate the English position on this interesting question, let me give you a case from which any man of common understanding can eliminate a principle. One D. K. had removed from Kansas to Iowa, and had been living in the latter state for about a year. He left behind him a woman and her "kith and kin" who wished to sue him in several actions, civil and criminal, but it was more convenient to sue him in Kansas. A case was hatched up for forgery. Affidavit was made in due form, and D. K. was extradited from Iowa, and brought back with all due solemnity, in bonds, to Kansas. Here there was no charge of forgery against him, but he was put on trial for obtaining five promissory notes by a false token or writing. There was not a shadow of pretence for this charge, and on a trial on the merits, he was acquitted. In the meantime, and while under arrest, he was sued in two or three other cases. The plea was made and filed that this whole proceeding was conceived, begun, and prosecuted for the purpose of, in fraud of and ousting Iowa, a sovereign, independant state, of her jurisdiction and transferring it *in personam* to Kansas. But on the authority of Judge Church's decision, the court overruled all the pleas, and held that if a man was in a state—no matter *how* he was brought there, whether voluntarily or involuntarily—you could, in defiance of his rights of citizenship, plaster him all over with writs for any and every offence—black-mail him and make him buy his immunity in states where "justice is administered without sale, denial or delay." The English people are right, and whenever we conclude a treaty with them, it will have to be, and ought to be, that the criminal is to be tried for the offence for which he is extradited. The strangest part of this matter is that it had not occurred to men a thousand years ago. Under *our* construction, and under the state usage as established by Judge Church's decision, all you have to do when you wish to get jurisdiction of a man's person is to bring him within the ocular range of the tippstaff.

England's view of this matter will finally be accepted, and I again repeat that Congress should pass such a law between the states.

OTTAWA, KANSAS. W. H. M.

Book Notice.

THE AMERICAN RAILWAY REPORTS. A COLLECTION OF ALL REPORTED DECISIONS IN THE UNITED STATES RELATING TO RAILWAYS. By HERBERT A. SHIPMAN, of the New York Bar. Vol. VII, New York: James Cockcroft & Co., 1876.

This ought to be one of the most valuable of the many series of reports now being published, but it is hardly necessary to say it is not. One given to the use of strong terms would call it a fraud. Being more conservative in our tendencies, we are content with saying that it is exceedingly unsatisfactory. In the first place, all the railway decisions are *not* collected, and the selections seem to be made at random, without regard to their importance or novelty; one case evidently being considered as good as another for filling up space. In the second place, the volumes are too thin. The printed pages are short and narrow, but the margins are ample. Costing more, these reports contain less than half as much matter per volume as the *American Reports*. Fairly edited and honestly published, these reports would be valuable and popular, and would be in large and permanent demand. The growing popularity of the *American Reports* is due mainly to two facts: first, they are edited with care and ability, and second, they are crammed as full of law as an egg is of meat. The purchaser gets his money's worth in quantity as well as quality. It is not paper and sheep-skin that the lawyers are after when they buy law books; and in the American Railway Reports they get too much of these commodities in proportion to the amount of reading matter.

M. A. L.

Queries and Answers.

QUERIES.

[In order to save space, queries inserted in the JOURNAL will hereafter be numbered during the year. In answering queries, correspondents are requested to give the number of the query answered.]

12. Conveyance—Married Woman.—A., in 1872, executed and delivered a quit-claim deed to his wife, consideration, one dollar, to certain real estate in Missouri, in which the wife held dower. In April, 1872, the wife made and delivered a quit-claim deed back to A., her husband, for same lands, consideration, one dollar. In her acknowledgment it is not stated that she was examined separate and apart from her husband. During the year 1872 the wife died. What interest did the husband, A., convey to his wife? If any, what effect will the defective acknowledgement of the wife have? Can the wife make a valid deed to the husband?

STUDENT, Canton, Mo.

ANSWERS.

11. Lien of State on Property of Defendant.—An answer to this query can be found in the recent decision of the Supreme Court of Alabama, in the case of Dallas county v. Timberlake, et als., opinion in MS. The decision there is, that a tax collector's official bond is a *lien on his property and that of his sureties from the date of his default*, and this decision simply decides that, notwithstanding the law or statute to this effect may be a great hardship on some persons, yet *it is the statute*, and must be carried into effect.

M. L. & N., Selma, Ala.

Recent Reports.

CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE SEVENTH JUDICIAL CIRCUIT. By JOSIAH H. BISSEL of the Chicago bar, Official Reporter, Vol. V., 1851–1874. Chicago: Callaghan and Company, 1876.

This is a volume of five hundred and seventy pages and contains opinions delivered by the judges of the seventh circuit, from March term, 1851, to February term, 1874. Brevity is a distinguishing feature of the cases reported here, the opinions not covering, on an average, more than four pages each. Decisions in admiralty and bankruptcy are of course more numerous than on other points; still, there are adjudications of novelty and interest under other heads. Among the decisions in admiralty is the case of the W. H. Clark, p. 295, where it is held that where two steamers are going in the same direction, it is the duty of the pursuing boat to avoid the other, but the leading vessel is not justified in suddenly changing her course so as to embarrass, or throw herself across the track of the other. There is also a *quære* by the court whether the jurisdiction of admiralty could be sustained against a raft. In the Gate City, p. 200, it is held that the captain of a vessel having no lien for his services, can not maintain a libel for additional services as clerk or manager, without showing a special contract designating the extra compensation to be paid him as such. (For a late decision, see the case of Zollinger v. Str. Emma, 3 CENTRAL LAW JOURNAL, 285, where Hill, J., decides that the clerk of a steamboat has no lien.) In the same case it is also held that a maritime lien is not waived by the attachment of the vessel under a state law and receiving notes in settlement of that proceeding, which afterwards become worthless.

Among the bankruptcy decisions is Gibson v. Dabie, p. 198, where a conveyance was made by an insolvent debtor of his real estate to his wife, without consideration, she giving a mortgage thereon to creditors who knew the debtor to be insolvent. It was held a preference under the bankrupt act and void against creditors, the mortgage of the wife being the same, in legal effect, as the mortgage of the husband. *Re* Poleman, p. 526, decides that a bankrupt is entitled to a homestead exemption in property occupied by himself as a homestead, even though he had previously waived his rights in favor of a particular creditor, as such waiver only applies to persons claiming under the instrument in which the waiver was made, and does not issue to the benefit of the assignee or other creditors. The practice to be adopted in setting aside homestead is also stated. In *re* Farnsworth, Brown & Co., p. 223, it is held that a bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after filing of petition in bankruptcy, and can apply such proceeds upon the note. *Re* Teny, p. 110, decides that it is not an act of bankruptcy for the partner to induce another to depart from the state. Among the cases on other points and of interest are: United States v. Kenneally, p. 122, holding that on an indictment for having in his possession counterfeit treasury notes, the good character of the accused may be shown as evidence of his intention, and absence of such evidence is a strong circumstance to show that he has no such evidence to produce; and also that it is the duty of the court, on application of the prisoner, showing that he is unable to send for his witnesses, to summon them at the expense of the government; Doremus v. Burton, that where a note, drawn without grace, falls due on Sunday, demand and protest on Saturday are good. In the United States v. U. S. Express Co., 91, it is held no violation of the post-office laws for an express company to carry with a money letter or packet, an unstamped letter of advice concerning the money.

The publishers are the well known Chicago house of Callaghan and Company, and the volume before us will not injure their reputation as legal publishers. The editor has done his work accurately. The syllibi are well written, the proof has been carefully read, and the index perfectly compiled. In addition, numerous notes have been appended to the principal cases.

—EX-SENATOR Carpenter, in the late Ottman trial in Washington, told the following anecdote: At the time of the proposed arbitration between this country and Great Britain, which resulted in the settlement of the Alabama claims, there was a hitch in the progress of the treaty, caused by what the committee on foreign affairs conceived to be pure "cussedness" on the part of the Queen, and a Western senator said to Mr. Fish, "Tell the old lady to go to hell. Of course you will put it in diplomatic language."

Briefs.

[The purpose of this column is to aid practitioners in the exchange of briefs on important subjects. For this reason it is impossible for us to notice any brief which does not contain a statement of the case involved. It would be more satisfactory to all concerned, if those sending briefs would send with them succinct outlines of the points. Correspondents expecting to have their briefs noticed, must give their *post office* address.]

Compensation of Infant for Services.—Winland v. Deeds, Supreme Court of Iowa. Argument for defendant, pp. 15. Plaintiff was nine years old when he went to live with defendant, and was treated as a member of defendant's family. He was to stay until he reached the age of 21 years, and then was to receive a horse, bridle and saddle. Defendant was to school plaintiff at least three months a year, and clothe and board him. Owing to some trouble with the hired girl, plaintiff left at the age of sixteen, and brought suit against defendant, claiming $800 with interest from 16th of December, 1867, the day he went to live with defendant, to the 19th day of March, 1874, the day he left. Plaintiff left at his own volition. There were no articles of apprenticeship, but the evidence substantiated the foregoing facts. The two questions are: 1st. Is defendant liable for labor performed by plaintiff under the existing circumstances. 2nd. Is there an implied contract existing for compensation, between parent and child on the one hand, and on the other, for services between a child and a person assuming the position of parent. [Address Van Valkenburg & Hamilton, Fort Madison, Iowa.]

Mandamus—Public Highway—Limitation—Non User.—Davies v. Huebuer, Supreme Court of Iowa. Brief for plaintiff pp. 34. Petition for a writ of *mandamus* to compel defendant, a road supervisor, to remove obstructions from a certain public highway. The following are the legal propositions maintained: 1. If a highway has been finally established by competent authority, it follows as a legal sequence, that from thenceforth it shall be considered a public highway, and the repeal of a statute will not effect rights accrued and vested under it. 2. The statute of limitation does not apply to the plaintiff in a petition for *mandamus* the same as in other actions between individuals. That statute does not run against the state, "*nullis tempus occurit regi.*" If the state of Iowa had commenced this suit, *ex rel.*, district attorney for the first judicial district of Iowa, the statute of limitations would not be a bar to the same, and the mere fact, that plaintiff assumed the bruden of trying to compel the defendant to remove obstructions from a public highway, does not change the rule. 3. The doctrine of non-user does not apply where an easement is acquired by express grant. 4. Nor to the case of a public road. 5. The highway in question is not an entirety. [Address Van Valkenburg & Hamilton, Fort Madison, Iowa.]

Railroad Company—Right of Way—Nuisance.—H. & T. C. R. R. Co. v. Odom, Supreme Court of Texas. Brief for appellee, pp. 31. Suit against a railroad company for damages by the street in front on plaintiff's house being obstructed and rendered impassable, and the annoyance of noise and smoke caused by the engines of the defendant. Plea, that it had authority to extend its railway on said street under an act of the legislature, and also by agreement between defendant and the authorities of the city of Austin. Replication, that the act was unconstitutional, and that the city council by the charter of the city of Austin had no authority to grant defendant the right of way. The plaintiff, appellee on appeal, bases his argument on the grounds set out in his replication. [Address John W. Robertson, Esq., Austin, Texas.]

Bank Notes—Limitation of Action upon.—Watson *et al.* v. Bank of Tennessee. Supreme Court of Tennessee. Brief for plaintiff, pp. 35. The question raised in this case is: Does the statute of limitation of six years run against the notes of a bank, issued and put into circulation as money, upon the expiration of its charter by limitation, or upon its annulment by forfeiture, or upon the dissolution of the corporation by any competent act, where the corporate existence is continued for a term of years, by general act of the legislature, for the sole purpose of enabling it to wind up and settle its unfinished transactions, but with an express prohibition against its continuing its corporate business; and can its assets, that by construction of law are a trust fund, but which have been held by the trustee,—the personality for more than three or six years and the realty for more than seven years,—*adversely* to the right or claim of one class of *cestuis que trust*, and in favor of another class, with direct notice of such adverse holding, be subjected, by a proceeding in equity, to the satisfaction of the claims of the former class? The point is discussed very elaborately in this brief. [Address Frank T. Ried, Esq., Nashville, Tenn].

Legal News and Notes.

—Last week an objectionable paper was suppressed in a western city. The publisher defended himself by bringing into court a copy of Homer's "Iliad," Dean Swift's works, Fielding's "Tom Jones," "Don Juan," Mrs. Behn's novels, and other standard publications. The German justice declined to look at the marked passages, but only said, "See here; I tole you ve doan't did lif in dose remote achis," and sent him up.

—In a case before the Irish Court of Exchequer Chamber, recently, in which the issue was tried before the Lord Chief Justice and a special jury, in February, and after an investigation extending over three days, a verdict was found for the plaintiff, Mr. Baron Dowse remarked:—"I have the learned judge's notes before me, but no human being, considering himself as a human being, could understand what this is all about. The cabalistic figures of the Lord Chief Justice 'L.X. Q.B.' on his notes are inexplicable."

—In Smith v. City of St. Joseph, 55 Mo. 456, it is held that in a suit to recover injuries to a wife caused by defendant's negligence, two actions will lie, one by the husband alone for loss of service, expense, etc., and the other by the husband and wife jointly for the injury to the person.

—A witness was under examination in a Toronto court in the case of an unpaid account, when the judge put the question to him, "What is your occupation?" The witness did not seem to understand the meaning of the word "occupation," and answered with "Eh?" The judge—"What do you do for a living?" Witness—"Oh, my wife's a dressmaker!"

—The first of the test suits brought in the United States District Court in New York against importers of foreign spirits, was tried on the 7th inst. resulting in a verdict for the government. The decision requires such importers of spirits to pay the wholesale liquor dealers license. Suits against six others importers are settled by this issue.

—Baker Voorhis & Company announce an American edition of Mr. Herbert Broom's "Philosophy of Law." Mr. Broom was late Professor of Common Law to the Inns of Court, and this volume contains notes of his lectures between 1852 and 1875. He is among the ablest writers on legal subjects, and his new work will be welcomed by a wide circle of readers.

—Judge Neilson on Lord Coke.—From an article in the *Independent* on the jury, from the pen of Judge Neilson of Brooklyn, we clip the following sketch of the great English lawyer, Lord Coke; "We call up in review before us the life of Coke with alternate emotions of regret, shame, sorrow, pride and consolation. Was that life as the journey of a day? If so, it was by pathways through dreary and desolate wastes, over Serbonian bogs, each footstep sinking in the slime, but occasionally leading up to Alpine heights, glowing with celestial light and beauty. It was a life often marred by want of moral tone; often redeemed by elevated sentiments; full of distortions and contradictions. As the speaker when in Parliament, under Elizabeth, he was shamefully subservient; as crown officer, extorting confessions from prisoners put to torture, he was pitiless; as attorney-general, uttering reproaches and accusations against Sir Walter Raleigh, on trial for his life, he was fierce and brutal. His devotion to study and his mastery of the law were unprecedented; his assertion of his rights as a judge, against royal intrusion, was admirable; his intrigue to regain the royal favor by the marriage of his daughter to to the brother of Buckingham was intolerable; his independence, virtue, courage, devotion, in Parliament under James I and Charles I, gave special grace and value to the history of the times. But our sensibilities are touched when we find him a prisoner in the tower of London. The room to which he is consigned, long devoted to ignoble uses, becomes sacred. We enter with reverence, as upon holy ground. He is absorbed in his work on the Commentaries. As he writes, the hand is tremulous; but that hand had never been polluted by accepting bribes."

—Prolixity in pleadings was treated with rather more severity in old times in England than it is now, when the worst that a lawyer can expect is to have the unnecessary facts of his pleading struck out, and sometimes to be *mulct* in costs. But in 1596, in the case of Mylward v. Weldon, *Acta Cancellaria*, p. 692, the decree states that the replication "doth amount to six score sheets of paper, and yet all the matter thereof which is pertinent might have been well contained in sixteen sheets of paper, wherefore the plaintiff was appointed to be examined to find out who drew the same replication, and by whose advice it was done, to the end that the offender might, for example sake, not only be published, but . . . . that the defendant might have his charges sustained thereby; and for that it now appeared to his lordship, by the confession of Richard Mylward, . . . that he, the said Richard, himself did both draw, devise and engross the same replication," the court ordered the Warden of the Fleet to take the said Richard into his custody and to bring him into Westminster Hall, and then and there to "cut a hole in the myddst of the same engrossed replication," put the said Richard's head through the same hole, and so let the same replication hang about his shoulders, with the written side outwards, and then to lead the same Richard, bareheaded and barefaced, round all the courts at Westminister Hall, and afterwards keep him in prison till he paid a fine of £10 and costs to the defendant. Master Mylward doubtless employed a lawyer in his subsequent litigation, and did not attempt to prepare his own pleadings again. Two years before the above case, in Lacy v. Lucy, *Acta Can.* p. 644, a plaintiff who had, "to increase the defendant's charges of suit, and for his great vexation, . . . exhibited and put into this court a replication of four great skins of parchment closely written, containing many frivolous and slanderous matters," was committed to the Fleet; but he was subsequently discharged, on acknowledging in writing his fault. And in a case of Hendere v. Penkeville, in 1607, *Acta Can.* p. 81, there is a certificate of Sir Matthew Carew, a master in chancery, that the "defendant's answer (which seemeth not to have been put in by advice of counsel)" was "faulty and peccant, both in matter and form; wherein is unordinately inserted much unnecessary and impertinent matter, drawing the said answer to unnecessary length, . . . wherefore, in my opinion, it were fit that the whole answer (being yet a rude and *indigesta moles*), should be committed to learned counsel to be cast again by a perfect artificer into a new mould;" and he recommended that the answer be not allowed to remain among the records of the court, and that the defendant be ordered to pay 40s. for his costs. In Byddle v. Commaunder, in 1614, *Acta Can.* p. 205, the master certified that the answer of Porthouse, a defendant, was "very tedious, frivolous, and insufficient," and that he was "induced to conceive the same to have been drawn by Porthouse himself, who seemeth to be a very troublesome fellow."